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No. 788.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

SAMUEL BROS. & COMPANY (a corporation),
Appellant,

vs.

THE HOSTETTER COMPANY (a corporation),
Appellee.

APPELLANT'S BRIEF.

R. H. COUNTRYMAN,
Solicitor for Appellant.

Pernau Bros. Print, 543 Clay St., S. F.

Rundy Circuit
Court of Appeal
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APPELLANT'S BRIEF.

Statement of the Case.

Appellee claims to be the owner of a certain liquid preparation, which it designates and calls a medicinal preparation, and which it advertises to cure dyspepsia, indigestion, constipation, biliousness, nervousness, liver andkidney trouble, sleeplessness, fever and ague, malaria, rheumatism, chronic diarrhœa, diseases of the urinary organs, and any and all kinds of kidney and stomachic troubles. It advertises that it is most excellent for women, and cures her of all the disorders to which she

is functionably liable. It recommends and prescribes the consumption of its bitters by the wine-glassfull at least three times daily before meals. In its almanac for California and Oregon for the year 1901, under the heading in bold type, "Important to our patrons", it advertises, "The public should also beware of the local " bitters attractively labelled and sold as 'appetizers' " and 'stomachics'. The injury inflicted upon the " stomach by these drams in disguise is irreparable. " They are composed of cheap and fiery spirits, with " some bitter extract infused for flavoring, and in con- " sequence of the low price at which they are sold, " enjoy the patronage of impecunious imbibers."

Appellee claims to have acquired the title to these bitters by purchase from the administrator of the Estate of David Hostetter, deceased, on May 1st, 1889, and that it has the right and title to the exclusive use of the words " Hostetter's Celebrated Stomach Bitters", Hostetter's Bitters", "Hostetter Bitters", "Hostetter", "Host", and "H. Bitters". It claims to be a corporation organized under the laws of the State of Pennsylvania on May 1st, 1889. On July 15th, 1899, it filed its bill of complaint against appellant, in which it set up its corporate capacity, and its purchase of the exclusive right to make and sell said compound. That said stomach bitters were sold in bottles only to which were attached labels, which labels were duly registered as trade-marks. No attempt was made to prove any registered trade-mark, appellee

relying entirely on unfair competition.

It then charges against appellant (p. 8), "Upon appli- " cation for Hostetter's Bitters by an intending pur- " chaser, he is sold and delivered by defendant, stomach " bitters as aforesaid in bulk at $2.25 a gallon, the " same so near in resemblance to your orator's bitters " as to mislead and deceive the ordinary purchaser, and " at the same time he is advised, and it is suggested to " him by defendant company that in order to make the " most money by a resale of said bulk bitters, he first " purchase a case (one dozen bottles) of your orator's " bitters, and whenever a bottle becomes empty, by sale, " by the dose or drink, to then refill said bottle with " the said bulk bitters, which he assures the purchaser " are the genuine bitters made and sold by your orator, " and stating that your orator sells the same in bulk " 'to importers only'; and defendant company also " furnishes and delivers to such customer the " said empty bottle, having thereon the labels " and trade-marks of your orator, for the avowed " purpose, coupled with the advice of defend- " ant company, to be refilled with its spurious or " bogus bitters, and then sold to consumers as and for " your orator's bitters."

The appellant denied the corporate existence of appellee, denied its purchase from the administrator of David Hostetter, deceased, or any other person, of the exclusive or any right to make or sell said compound, and denied that complainant had such exclusive right or the

exclusive right to any of said names or any abbreviation thereof.

It further plead as follows (page 22): "Defendant " admits that it has sold, and is now selling, and in- " tends to continue to sell, at its place of business, an " article of stomach bitters slightly resembling the " stomach bitters made by complainant in color, taste " and smell, but this defendant says that it has only " sold a very small quantity of said bitters, has never " attempted to push or urge the same in connection " with its business, and that such bitters as it has sold " has only been incidental to its main business of the " sale of wines and liquors of which it may have the " agency, or be the proprietor, and that such bit- " ters as it has sold, of any kind or character, " are very limited in quantity and amount and value, " and this defendant denies that any of said articles of " stomach bitters have been sold, or are now being sold " with any desire to reap the benefit from the trade cre- " ated and enjoyed by complainant in the stomach bitters " prepared and sold by it; and denies that any of said ar- " ticles of stomach bitters so sold by it are sold as in the " manner set forth in the sixth paragraph of said com- " plaint, or in any manner which is unlawful or a fraud " upon complainant; and denies that when an application " for Hostetter's Bitters is made to defendant by an in- " tending purchaser, such customer is sold and delivered, " or sold or delivered by defendant stomach bitters so " nearly in resemblance to complainant's bitters as to

" mislead and deceive, or mislead or deceive the ordin-
" ary or any purchaser; and denies that at the same
" time such purchaser or customer is advised, or it is
" suggested to him by defendant, that in order to make
" the most money by refilling of said bottles, he first
" purchase a case consisting of one dozen bottles or any
" number of bottles of complainant's bitters, and when-
" ever a bottle becomes empty by sale by the dose and
" drink, or dose or drink of complainant's bitters, to
" then refill said bottle with the bitters which said cus-
" tomer has purchased from defendant; and denies that
" defendant ever assures any customer that the bitters
" so sold by it are the bitters made and sold, or made
" or sold, by complainant; and denies that it states to
" such customer that complainant sells said bitters in
" bulk to importers only; and denies that it furnishes
" and delivers, or furnishes or delivers, to such custom-
" ers an empty bottle having thereon the labels and
" trade marks, or labels or trade marks, of complainant,
" for the avowed or any purpose, coupled with the ad-
" vice of defendant company to refill said bottle with
" the bitters sold to said customers; and denies that
" said bitters sold by this defendant are spurious or
" bogus bitters, but that on the contrary the same are
" superior in quality and beneficial effect to the bitters
" manufactured and sold by complainant."

Appellant further alleges that the words, the exclusive use to which are claimed by appellee, are simply descriptive words, or qualifying adjectives indicative of a

special product used to designate a compound of bitters made according to a formula known to pharmacists and chemists, and that said bitters have for many years last past been sold by many persons rightfully and lawfully in the open market.

Appellant further alleges as follows (page 25): "And " further answering said bill of complaint, defendant " alleges that whenever an intending purchaser of bit- " ters made and compounded by complainant, or when " any person calls at defendant's place of business and " demands to be sold and delivered, or sold or delivered " the bitters made and compounded by complainant, " giving the name 'Hostetter's Stomach Bitters', or " 'Hostetter's Bitters', defendant sells and delivers to " him upon such demand the stomach bitters com- " pounded, bottled and sold by complainant in original " packages, and that defendant does not sell and never " has sold to any person, upon a call for 'Hostetter's " Stomach Bitters' or 'Hostetter's Bitters', any bitters " except those compounded in original packages, and " that if, under any circumstances, any other bitters " have been sold in bulk or otherwise by any of the " clerks, agents or employees of defendant as and for " the bitters compounded for complainant, or if any of " said clerks, agents or employees have refilled any " bottles which once contained the bitters compounded " by complainant, such acts are isolated cases, unknown " to defendant, and wholly without its countenance, " sanction or authority."

Appellant's answer was filed on September 30th, 1899.

To sustain the allegations of the bill of complaint, appellee on October 2nd, 1899 (pp. 63, 64), served on appellant's solicitor, in San Francisco, a notice that on Friday, the 13th day of October, 1899, at 10 o'clock A. M., in the City of Pittsburg, Pennsylvania, it would proceed to take the testimony of D. Herbert Hostetter, R. S. Robb, John S. McCullough and John B. Crooks, in shorthand to be thereafter transcribed, etc. (page 62).

Pursuant to said notice the depositions of R. S. Robb, John B. Crooks, John S. McCullough and F. P. Carson were taken on October 9th 1899, in said Pittsburg, in the absence of any person representing appellant (pages 30 and 31).

On October 27th, 1899, appellee served on appellant's solicitor, in San Francisco, a notice that on Thursday, December 7th, 1899, in said Pittsburg, it would proceed to take the depositions of R. S. Robb, John S. McCullough, John B. Crooks and F. P. Carson (pages 93, 94 and 95).

Under said notice, in the absence of appellant, or its solicitor, said depositions are purported to have been taken on December 18th, 1899 (page 65).

These depositions are the subject of criticism for a number of reasons. Under the first notice the deposition of Mr. Hostetter was not taken, while the deposition of Mr. Carson, who was not named in the notice,

was taken. The depositions were not taken pursuant to the notices. The first one was taken prior to the time fixed in the notice, the second subsequent to said time, and the taking of the same was continued without the consent of appellant.

It is evident from the depositions themselves that the witnesses did not appear and give their testimony, and that the certificates of the notary public that the witnesses appeared before him is not true.

The depositions show on their face that they are simply copies. This fact clearly appears from a consideration of the depositions themselves. In the depoposition taken October 9th, 1899, consider the deposition of R. S. Robb. Certain questions were asked this witness and his deposition was completed. (See pages 31 to 40.) He was recalled on October 11th, 1899, and gave further testimony (pp. 48–52). In the deposition taken December 18th, 1899, the testimony of Mr. Robb appears *mutatis mutandis* as in the deposition of October 9th, 1899, the same questions are asked, the same stops and breaks are made in the questions, the same answers are given, the same stops and breaks are made in the answers. For illustration, take the questions and answers on pages 49 to 52:

" Q. Without setting it forth to any extent, will you " give us something of the substance of it—the names " and the dates—in support of the statement in the bill?

" A. Yes, sir. The following is the substance of

" the article of agreement between the Hostetter Com-
" pany and the administrator of the estate of David
" Hostetter—

" Q. (Interrupting.) That was subsequent to the
" incorporation of the Hostetter Company in the State
" of Pennsylvania, was it?

" A. It was on the same day.

" Q. On the same day as the incorporation?

" A. Yes, sir. (Continuing.) The original agree-
" ment reads as follows:

" 'Article of Agreement, made this first day of May,
" '1889, between D. Herbert Hostetter, administrator of
" 'all and singular the goods and chattels, etc., of D.
" 'Hostetter, late of the City of Alleghany, in the
" 'County of Alleghany, and State of Pennsylvania, de-
" 'ceased, party of the first part, and the Hostetter
" 'Company, a corporation of the State of Pennsylvania,
" 'party of the second part.'

" Q. Just give us the substance of it. What was
" conveyed for value, who is it executed by, and the
" date.

" A. The party of the first part agrees to sell, as-
" sign and transfer to the party of the second part, and
" its successors and assigns, all the goods, chattels and
" property, of whatever kind or nature, including the trade
" marks, recipes, formula and goodwill, which belonged
" to or were owned by the late firm of Hostetter &
" Company. This includes the formula, recipes and
" trade-marks, for the manufacture, identification and

" sale of Dr. J. Hostetter's Celebrated Stomach Bitters.

" Q. Just state how the present company got title " to the property.

"A. Hostetter & Company was composed of Dr. David " Hostetter and one M. L. Myers, who had no monetary " interest in the business.

" Q. Then Myers was a nominal partner.

"A. Yes; he was merely a nominal partner.

" Q. And he aquiesced in this conveyance.

"A. Yes; he acquiesced in this conveyance.

" Q. All right, go ahead. The date of that was " what?

"A. The first day of May, 1889.

" Q. Who was it executed by?

"A. This agreement is signed by D. Herbert Hos- " tetter, administrator, party of the first part, and " The Hostetter Company, party of the second part, by " D. Herbert Hostetter, president.

" Q. Who is it witnessed by?

"A. It is attested by the seal of the company, and " the signature of the secretary, M. L. Myers.

" Q. That is the same Myers who was the nominal " partner?

"A. Yes; the same gentleman who was the nominal " partner in the firm of Hostetter & Company.

" Q. Are you familiar with the handwriting of these " gentlemen?

"A. I am.

" Q. And you know them to be their signatures?

"A. I know these signatures to be all genuine, as " well as the seal of the company—of The Hostetter " Company—which is hereto attached.

" Q. What did the company acquire by this—any " real estate, leases, or anything of that sort.

"A. They acquired no real estate; they acquired all " of the goods, merchandise, machinery and stock, for " manufacturing purposes, in all its forms and condi- " tions.

" Q. That is, for manufacturing bitters?

"A. Yes; for manufacturing bitters, and also for " printing almanacs, including presses, paper, type and " materials of all kinds; boxes, packing, bottles, caps " and all machinery and appliances for carrying on the " business, boiler, engine and the plant generally, " which includes pulleys and shafting together with the " formula, recipes, goodwill, trademarks, and all other " properties that theretofore had been the property of " Hostetter & Company and Hostetter & Smith.

" Q. And I suppose the complainant—The Hostet- " ter Company—still owns and holds this property that " it purchased at that time.

"A. Yes, sir; so much of it as is not perishable, as " paper, ink—wear and tear.

" Q. The leases were also turned over to the present " company, were they—the leases of the manufacturing " buildings?

"A. Yes, sir."

By inspection of pages 76, 77, 78 and 79 it will be

found that there is not so much as a change of a punctuation mark from the above quotation, although it is claimed that these depositions were taken one on the 9th day of October, 1899, and the other on the 18th day of December, 1899.

At the time of the trial of this cause before the Circuit Court a number of other causes in which the Hostetter Company was the complainant, were presented to that Court. The bills of complaint were similar, and the arguments were made at one successive session of the Court. The depositions taken in Pittsburg in the other causes are exact duplicates of the depositions taken in the cause at bar. In fact, even the same typographical errors appear in some of them, showing that they were merely carbon copies.

Appellant objected to these depositions for the reason stated and other reasons, and renews its objections to them before this Court.

For the purpose of obtaining testimony appellee hired two spies, W. R. Morrison and J. W. McEvers. Morrison was the leader. At the time he gave his testimony, on December 28th, 1899, he was twenty-four years of age. He had been in the Army about seven months, had been employed at one time by a lumber company, but had no regular business (p. 139), McEvers was thirty-eight years of age, claimed to be a druggist, but he never had any degree and knew but little of chemistry (pp. 207, 211). He was put forward as an expert by appellee, but he did not even know that

appellee's bitters contained alcohol (p. 188).

The only proof of any wrong-doing that has been produced or could be produced against appellant is that of these two witnesses, who were hired for the purpose of obtaining testimony. Their testimony was more than met by the testimony of defendant's witnesses, and we think the distinguished Circuit Judge overlooked the testimony of defendant's witnesses, and the very flimsy character of the testimony produced by appellee as to any wrong-doing by appellant from the fact that a number of similar cases were argued and submitted at the same time.

Appellant maintains that it in no way violated any property right or any trademark right of appellee, and that it is not guilty of any of the acts charged against it in the bill of complaint, and for that reason, disregarding all of the other defenses, the decree should have been rendered in its favor.

Appellant pleaded a special defense to the appellee's bill of complaint, setting forth that appellee was guilty of a fraud on the public in palming off on the public an alcoholic stimulant as a medicinal article, and a large amount of testimony was taken in connection with this defense. The effect of alcohol on the human system was considered by experts. Appellant obtained its expert testimony in San Francisco. All of the expert testimony of appellee came from the East. Appellant contends that appellee should have at least shown that it was impossible to obtain expert testimony

in California, and that under the circumstances, appellee's expert testimony should be received with great caution. The testimony discloses that appellant is a mercantile house in San Francisco, of high standing, doing a large business. Mr. Levy testified that he did not feel like disclosing the amount of appellant's business, but that it was considerably in excess of one hundred thousand dollars a year. That the entire amount of bitters sold by the house did not exceed the sum of $70 a year invoice price (pp. 223, 224, 225 and 226). That the house was largely engaged in the whisky business. That it carried Hostetter's Bitters in bottles, but that its sale of bitters of all kinds and character was very small (p. 226).

The decree was filed and entered August 30th, 1901, in effect, holding that appellant for the purpose of disposing of seventy dollars worth of bitters a year, in a business running up into hundreds of thousands of dollars, had engaged in a deliberate fraud, the only basis of which was the testimony of two men who were hired and paid for the purpose of obtaining testimony.

Specifications of Error.

The Honorable Circuit Court erred

I.

In ordering and granting an injunction against the appellant.

II.

In entering the interlocutory decree in favor of the appellee herein for an injunction.

III.

In holding the equities of this case in favor of the appellee and against appellant.

IV.

In holding that the use of the names "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them by appellant upon any liquid bitters or medicinal liquid, being an extract of bitter roots or herbs in a solution of alcohol, is unfair competition by appellant with appellee's business.

V.

In granting an injunction so far as it relates to the words or names of "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them to be used in connection with the manufacture or sale of a liquid or medicinal compound or preparation.

VI.

In granting an injunction so far as it relates to the making or using or selling any liquid or laxative medicine or medicinal preparation, under or marked with the several names or words of "Hostetter's

Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them.

VII.

In holding that the appellee is entitled to a trade-mark or trade name in the words or names "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them as applied to a liquid or laxative or medicinal compound or preparation

VIII.

In holding that the appellee had or now has or ever had the exclusive ownership of or the exclusive right to make or compound or sell a liquid or laxative or medicinal compound or preparation under the several names of "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them.

IX.

In holding that no firm or person or corporation other than appellee has the right to make or sell or deal in any article of stomach bitters under the names of "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them, when said bitters are not made or compounded by appellee.

X.

In holding that appellee has the exclusive right to

the name "Hostetter" or any abbreviation, alteration or amplification thereof, as used in connection with the compounding or sale of stomach bitters.

XI.

In holding that appellant has not the right to use the name "Hostetter" or "Hostetter's Celebrated Stomach Bitters", or "Hostetter Bitters", or "H. Bitters", in connection with the manufacture or compounding or sale of stomach bitters.

XII.

In holding that appellant refilled bottles resembling appellee's bottles, or suggested to intending purchasers or others any use of empty bottles once used by appellee for the purpose of selling to customers or others any article of stomach bitters not compounded or manufactured or sold by appellee.

XIII.

In not holding that the ordinary purchaser of appellee's article, believes when he is purchasing appellee's article that he is buying a medicinal preparation, whereas in fact he is purchasing an alcoholic stimulant.

XIV.

In not holding that the stomach bitters made and sold by appellee is an alcoholic stimulant, mixed with certain sweetening extracts and articles for the purpose of making the same palatable, and is not a medicinal preparation.

XV.

In not holding that the ordinary purchaser would be deceived to his harm by the statements on appellee's advertisements and packages.

XVI.

In not holding that there were material misrepresentations and false representations in and on appellee's labels, bottles, packages and advertising matter.

XVII.

In not holding that appellee's preparation of stomach bitters is a fraud upon the public tending to deceive the ordinary purchaser, and containing injurious and deleterious articles and beverages tending to the injury of, and to deceive the public, and the ordinary purchaser.

XVIII.

In not holding that appellee's business is fraudulent; that it falsely advertises and sells its preparation of stomach bitters as a medicinal compound or preparation, and that it intentionally, deliberately and purposely deceives the public and intending purchasers by its labels, bottles, packages, and advertising matter.

XIX.

In holding that the words or names "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", are words or names known to the drug trade or other trade or to the

medical profession, and to the public as being the exclusive preparation of appellee.

XX.

In holding that appellant has been guilty of fraud and deceit in using the words "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any of them in connection with liquid compounds, bitters, or preparations sold by it, not purchased from or manufactured by appellee.

XXI.

In holding that appellee offered any proof, or sufficient legal evidence to prove that it is a corporation.

XXII.

In permitting the depositions of the witness Robb, Crooks, McCullough and Carson, or any of them, to be introduced in evidence, and in not suppressing said depositions, and all of them, because timely notice of the taking of said depositions had not been given and because insufficient time had been allowed for appellant's counsel and solicitor to reach the place of the taking of said depositions and because the taking of said depositions was had before the time for which the same were noticed, and because the taking of the same was adjourned without the consent of appellant, and adjourned for more than one day, and not adjourned from day to day, and because it appeared that the taking of said depositions was unfair, and because it affirmatively

appeared upon the face of said depositions and of the depositions filed in the case of *The Hostetter Company* vs. *Martinoni*, and the other cases with which this cause was argued and heard before the above named Circuit Court that said depositions were carbon copies, and that the witnesses therein had not testified in the several different causes, and that it was not shown in which of said causes, if any, said witnesses had so testified, and that the same typographical mistakes appeared in each of said depositions, and in the depositions purporting to be taken under subsequent commissions, and that the taking of all of said depositions was noticed on the same day and hour of the day, all of which objections were made and urged before the Circuit Court on the hearing and argument and by said Circuit Court heard and considered and denied and decided against appellant.

XVIII.

In not striking out the testimony of the witness Robb relating to the bill of sale to the Hostetter Company on the ground that the same was not the best evidence, and that the bill of sale had been made by D. Herbert Hostetter, as the administrator of the estate of Hostetter, deceased, with himself, as vice-president of the Hostetter Company, and that no order of Court was shown authorizing the making of said bill of sale, or confirming the same, and that the testimony as to the value of the goodwill of appellee was based on its connection with the use of a secret formula, the knowl-

edge of which formula was not possessed by the witness giving his testimony, and that said secret formula was not divulged, and the best evidence was not introduced, and that only hearsay evidence was introduced in connection with the value of said goodwill, and with said bill of sale, and there was no proof of the value to appellee in the sale or manufacture of its bitters, article or preparation of none but fair competition, but all of said proof was based on the theory of a registered trade mark or trade name, and that the testimony showing that the stomach bitters of appellee were known indiscriminately to appellee as "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", was hearsay and incompetent and irrelevant testimony, and the testimony as to the registration of appellee's labels was incompetent, irrelevant and immaterial, as this was a case of unfair competition, and not one based on a trade mark, and that the evidence as to the bill of sale to appellee did not show the loss of the original, but did show that the original was in the possession of appellee, and that exhibits "A", "B", "C", and "D" to the depositions of said witnesses Robb, Crooks, McCullough and Carson could not bind appellant, and were not made or noticed as a part of the deposition of any of said witnesses, and that exhibit "D" was a consent decree, and offered after the adjournment and completion of the taking of the depositions of said witnesses, and that all of said testimony was incompetent, irrel-

evant and immaterial, all of which said objections were taken and made before said Circuit Court, and by said Circuit Court considered and decided, and denied against appellant.

XXIV.

In holding that appellee has a proprietary interest in, or an exclusive right to, the formula of "Hostetter's Celebrated Stomach Bitters", "Hostetter's Bitters", "Hostetter Bitters", or "H. Bitters", or any abbreviation, alteration, or amplification thereof, when said formula was not disclosed to the Court.

XXV.

In not holding that appellee is guilty of fraud in putting and placing upon the market as a medicinal preparation of value, a compound of stomach bitters, when in fact, the stomach bitters manufactured by it are of no value whatever, save as an intoxicating beverage and stimulant.

XXVI.

In not holding that appellee has been guilty of such moral wrong and obliquity as to deprive it of the protection of a court of equity.

XXVII.

In permitting a *dedimus potestatum* to issue to take the depositions of certain expert witnesses, without any showing that expert testimony could not have been obtained within the State of California, and in not sup-

pressing said depositions, all of which objections were made to and considered by said Circuit Court, and decided against appellant.

POINTS AND AUTHORITIES.

I.

Not having waived verification of answer, appellee was compelled to establish its case by two witnesses.

3 Desty's Fed. Procedure, 9th Ed. p. 1757 and cases cited.

II.

The testimony of appellee's agents should be received with great caution.

Hostetter Co. vs. *Bower*, 74 Fed. 235;

Gorham Mfg. Co. vs. *Emery-Bird-Thayer Mfg. Co.*, 92 Fed. 774; s. c. 104 Fed. 243.

III.

Where one procures a tort to be committed he cannot take advantage of it.

Gorham Mfg. Co. vs. *Emery-Bird-Thayer Mfg. Co., supra;*

Leibig Extract Meat Co. vs. *Libby, McN. Co.*, 103 Fed. 87;

State vs. *Hull*, 54 Pac. Rep. (Or.) 159;

Miller vs. *Donovan*, 39 N. Y. S. 820;

Howland vs. *Blake Mfg. Co.*, 31 N. E. (Mass.) 656;

See also *10 Harvard Law Review*, 181.

IV.

Appellee has no exclusive right to make Hostetter's Bitters, or to call them by that name.

Hostetter vs. *Adams*, 10 Fed. 838;

Hostetter vs. *Fries*, 17 Fed. 620;

Hostetter Co. vs. *Van Vorst*, 62 Fed. 600;
Singer Mfg. Co. vs. *Riley*, 11 Fed. 706;
Singer Mfg. Co. vs. *Larson*, Fed. Cas. 12,902;
Centaur Co. vs. *Heinsfurter*, 84 Fed. 955;
Centaur Co. vs. *Marshall*, 97 Fed. 785;
Watkins vs. *London*, 54 N. W. (Minn.) 193.

V.

As appellant is not connected with the sale made by its clerk there cannot be any recovery.

Gorham Mfg. Co. vs. *Emery-Bird-Thayer Mfg. Co.*, 92 Fed. 774;
s. c. on Appeal, 104 Fed. 243.

VI.

A symbol or label claimed as a trademark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, nor can any right to its exclusive use be maintained.

Holzapfel's Comp. Co. vs. *Rahtjen's American Comp. Co.*, U. S. Supreme Court, decided October 21st, 1901. Supreme Court Reporter, Vol. 22, p. 6;
Manhattan Medicine Co. vs. *Wood*, 108 U. S. 218;
Hilson vs. *Foster*, 80 Fed. 896;
American Cereal Co. vs. *Pettijohn Cereal Co.*, 72 Fed. 903;
Coleman vs. *Dannenberg Co.*, 30 S. E. (Ga.) 639;
Chapman vs. *State*, 27 S. E. (Ga.) 789;
Mitchell vs. *Commonwealth*, 51 S. W. (Ky.) 17;
Krauss vs. *Peebles*, 58 Fed. 585.

VII.

Appellee should have produced formula, which is the best evidence. Having produced inferior evidence, it must be presumed that the best evidence would have been adverse.

Hostetter Co. vs. *Comerford*, 97 Fed. 585, 586;
Cal. C. C. P., 1963 sub. 5;
Laird vs. *Wilder*, 9 Bush (Ky.) 131, 134–136;
s. c. 15 Am. Rep. 707, 710, 711.

VIII.

Any alleged medicine prepared by secret formula is quack medicine, and beneath the dignity of any Court to protect.

Fowle vs. *Spear*, Fed. Cas. 4996;
s. c. Cox, Trademark cases, 67.
Heath vs. *Wright*, Fed. Cases 6310;
s. c. Cox, Trademark cases 154;
Smith vs. *Woodruff*, 48 Barb. 438, 440;
Wolfe vs. *Burke*, 56 N. Y. 115, 122, 123;
Kohler Mfg. Co. vs. *Beeshore*, 59 Fed. 572;
Siegert vs. *Abbott*, 25 N. Y. S. 590, 597;
26 Am. & Eng. Enc. Law (1st Ed.), pp. 456, 458;
Hopkins on Unfair Trade, Sec. 27.

IX.

Appellee's bitters advertised as a medicine are merely an alcoholic stimulant, are contra-indicated in the diseases for which they are prescribed, and are a fraud on the public.

Alcohol is a food, but only very rarely a desirable food.

Hemmeter on Diseases of the Stomach, pp. 288–291.

Good discussion of the value of alcohol.

Thompson on Practical Dietetics, pages 206, 207.

Instances where alcohol is contra indicated.
Collated from Loomis on Practical Medicine:

ACTIVE HYPERAEMIA OF LIVER.

Defined, page 369.

Etiology, page 370.

Alcohol must be abjured, page 371.

PASSIVE HYPERAEMIA OF THE LIVER.

Defined, page 371.

No Carbo-hydrates (includes alcohol) pages 373–374.

CIRRHOSIS OF THE LIVER.

Defined, page 374.

Etiology, page 376.

ABSCESS OF LIVER.

Stimulants may be given, page 389.

Dr. Golding, appellee's witness, prescribed Hostetter's Bitters for this.

PERIHEPATITIS.

Defined, page 394.

Abstinence from all forms of alcoholic stimulants, page 396.

VII.

Appellee should have produced formula, which is the best evidence. Having produced inferior evidence, it must be presumed that the best evidence would have been adverse.

Hostetter Co. vs. *Comerford*, 97 Fed. 585, 586;
Cal. C. C. P., 1963 sub. 5;
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CATARRH OF THE BILE DUCTS.

No Carbo-hydrates permitted, page 431.

GALL-STONES.

Wines prohibited, page 440.

AMYLOID DEGENERATION OF KIDNEYS.

Defined, page 617.

Incurable, page 621.

Dr. Golding, appellee's witness, prescribed Hostetter's Bitters for this.

CYSTITIS OF KIDNEY.

Defined, page 643.

"No form of alcohol should be allowed", page 645.

RHEUMATISM.

Alcoholic stimulants contra indicated, page 899.

Diet must be non-stimulating, page 903.

GOUT.

Alcohol should be avoided, page 913.

DIABETES.

Alcohol in any form is harmful, page 921.

In chronic alcoholismus there is chronic gastritis, congestion, cirrhosis of the liver, fatty degeneration and dilatation of the heart, Bright's disease of the kidneys, page 954.

Collations from Hemmeter on Diseases of the Stomach:

CHRONIC GASTRITIS.

Alcohol should be avoided, page 468.

Nervous Dyspepsia.

If caused by abuse of alcohol, alcohol should be abandoned, page 872.

On the whole should be avoided, page 875.

Collations from Thompson on Practical Dietetics:

Alcohol as a Diuretic, page 211.

Action on Mucous Membranes, page 211.

Action on Gastric Digestion, more than ½ oz. in stomach retards digestion, page 211.

Flavored alcoholic beverages are seductive, and sometimes beget the habit of Alcoholism, page 232.

Cites Angostura Bitters, which are in the same category as Hostetter's.

Diabetes.

Patients do better without alcohol, page 658.

Liver Diseases in General.

"Alcohol had better be prohibited entirely", page 558.

Nephrites. (Inflammation of Kidneys.)

All sorts of liquors are absolutely prohibited, page 466.

Albuminuria.

All forms of alcoholic drinks forbidden, page 470.

Chronic Bright's Disease.

"Patients had better leave alcohol alone. * * * Occasional spree may do the patient less harm

than continued drinking in small quantity" page 475.

ALCOHOLIC DYSPEPSIA.

Only cured by entire cessation of drinking, page 498.

Collations from Herman on Diseases of Women, page 100:

CHRONIC METRITIS (Inflammation of Uterus), page 100.

Alcohol must be forbidden.

Effect on pelvic organs is to aggravate congestion.

Carpenter on Mesmerism and Hypnotism, pages 45-47:

Psychological effect of patent medicines.

In the New York Public Opinion, issue of March 28th, 1901, there will be found an article reading as follows:

"ALCOHOLISM.

"A discussion of this subject took place at the last meeting of the New York Academy of Medicine, as reported in the Medical Record. The president, Charles L. Dana, M. D., introduced the discussion with some general remarks in the course of which he said that as a rule the drunkard did not live more than fifteen years, and it was seldom that the human organism could survive more than 3,000 intoxications.

"BEER-DRINKING AND KIDNEY DISEASE.

"Dr. Hermann M. Biggs spoke upon this aspect of the question. He said that the majority of alcoholic patients at Bellevue gave a history of taking from one to three drinks of whisky, and from four to five pints of beer a day. In the last twenty-five years lager beer had largely replaced the weiss beer

formerly used in Germany, and during this period the death rate from disease of the kidneys had greatly increased. These facts appeared to find their explanation in the change in the type of drinking, *i. e.*, this combination of spirituous and malt liquors.

"EFFECT OF ALCOHOL ON THE NERVE CENTERS.

Dr. Allen Starr said that in the majority of individuals sherry produced a quarrelsome mood, while, on the other hand, port tended to exert a soothing effect. Champagne produced apparently a decided exhilaration of the flow of thought, while Burgundy made one think more slowly, and by no means added to the feeling of conviviality. Whisky, brandy, and gin had very different effects on the individual; hence, we should remember that we were not dealing with the effects of alcohol per se, but with its effects in certain combinations. There was no known disease of the spinal cord produced by alcoholism, although we knew of distinct effects upon the nerves and upon the brain as a result of alcoholism. The alcohol seemed to affect the parts of the brain which were the most highly organized and developed. The highest centers were the ones first attacked; the intermediate centers and the lower centers of the brain and the spinal cord, did not seem to be specially susceptible to alcohol. The pathology of alcoholic insanity was today most clear and distinct. Berkeley had shown that the alcohol acted upon the brain by dissolving, as it were, the dendrites, and so rendering the cells incapable of receiving impulses from other cells; hence, the lack of co-ordination and loss of memory, so evident in all conditions of chronic alcoholic insanity.

"ALCOHOLISM AND TUBERCULOSIS.

"Dr. S. A. Knopf said that alcoholism was a pronounced factor in tuberculosis. Statistics showed

that twenty-five per cent of children committed to sanatoria for the treatment of scrofulous and tuberculous diseases had alcoholic parents. It should be remembered that there was a very prevalent opinion among the laity, and to a certain extent among physicians, that alcohol was a most important agent in the treatment of consumption. If alcohol were given in quantities sufficient to control the temperature, it would convert phthisical patient into an alcoholic. As to the treatment of inebriates, the speaker said that he approved of moral suasion, arguments and hypnotic suggestion. Poor tenements and poor cooking were potent factors in the production of alcoholism.

"CARE AND TREATMENT.

"The hypodermic use of strychnine and atropine was now generally agreed to be the chief measure of usefulness, together with proper attention to the nutrition in cases of acute alcoholism. Dr. Starr did not think it was very common to find a recovery from chronic alcoholism of the type of periodical drinking in which there was an entire cessation of the drinking between the attacks. This form, he believed, was more a matter of moral obliquity than of true insanity. The diagnosis of insanity could not he made from a single symptom; there must be something more than a mere tendency to drinking on which to base the diagnosis.

"Dr. Peabody said that he had been told by a physician that in the so-called 'gold cures' it was the practice to give daily hypodermic injections of strychnine and atropine, the solution being of a golden color, but not containing any gold. After the treatment had been carried out along this line for a certain length of time, the patient was told that he could, if he so desired, go to the sideboard and help himself to liquor in the presence of the physician. Some would accept this invitation.

They would then receive what was apparently the customary hypodermic injection, but it was not really so, the physician having smuggled in a dose of apomorphine. Of course, when shortly afterward the patient vomited the liquor, he would be profoundly impressed, and disposed to believe the statement made to him that after having gone through the 'cure' it would be impossible for him to 'digest and retain' liquor, even if he saw fit to take it.

"IGNORANCE AND ALCOHOLISM.

"Dr. G. L. Peabody said that a speaker had sounded the true note when he had called attention to ignorance of the effects of alcohol as a cause of alcoholism. People were disposed to think that there was no particular harm in drinking spirits so long as one did not get actually drunk; they did not know, or else ignored, the pathological effect of continued moderate drinking. In these days of working under high pressure, the fatigue experienced toward the end of the day was the cause of indulgence in alcohol. Many business men thought they must take some alcoholic beverage at night, either with or before their dinner. At one time the Massachusetts State Board of Health had analyzed twenty or thirty specimens of 'bitters' found in the market. Many of these were recommended as substitutes for alcohol, and as conducive to temperance, yet they were found to contain from forty to fifty per cent of alcohol. The fact was commonly overlooked that sherry wine was not really a wine in the dictionary sense of the term, but really a flavored spirit containing from thirty to forty-five per cent of alcohol. Ladies would often take sherry wine because it was called a wine, though they would shrink from taking any spirit."

The Hostetter formula is well known and is to be

found in druggists' books.

Standard Formulary, 10th Ed., 1899, Albert E. Ebert, A. Emil Hess, p. 225.

Argument.

The corporate existence of appellee was not shown. After the cause was argued and submitted, appellee filed a paper which it calls its charter (pp. 547 to 552). As the law of Pennsylvania was not shown by testimony, the presumption is that the law of that state is the same as the law of California. (*Brown* vs. *S. F. Gaslight Co.*, 58 Cal. 426; *Mortimer* vs. *Marder*, 93 Cal. 172.) No attempt was made to show any compliance with the *Civil Code* of California relating to corporations.

Over the objection and exception of appellant, appellee was permitted to file what it calls an "assignment" to itself from the estate of D. Hostetter, deceased (p. 543). This so-called assignment was filed March 25th, 1901, and the cause was submitted on March 20th, 1901 (page 534).

This so-called assignment purports to be executed between D. Herbert Hostetter, as administrator, and himself as president of the Hostetter Company. In other words, a trustee in one capacity transfers property to himself, as trustee, in another capacity, without any order of Court, without any authority of law, without any confirmation by the Court having jurisdiction of the estate of D. Hostetter, deceased, and without the

receipt of the consideration named in the so-called instrument. No sale of any personal property of an estate of a decedent is valid in California, until the sale has been reported to and confirmed by the Court having jurisdiction of the estate (*Cal. C. C. P.*, 1517, 1518, 1524, 1526).

This so-called assignment recites a nominal consideration of $90,000.00, payable $9,000.00 in cash and $81,000.00 on demand (p. 544), for which the administrator of the estate sold personal property, the actual value of which is fixed in the assignment at $141,322.82, and the good-will, which according to the testimony of Mr. Robb is worth $1,000,000.00. For $9,000.00 in cash and $81,000.00 on credit, an administrator of an estate sells practically to himself property worth $1,141,322.82. The audacity of such an action staggers a California lawyer. Even the proverbial Philadelphia lawyer would be amazed. Conceding that the good-will was absolutely worthless, notwithstanding Mr. Robb's statement in his alleged deposition, yet there is transferred by the bill of sale, personal property of the value of over $141,000.00. That the administrator of the estate realized that he had no right to make such a sale on credit without any security, without the order of any Court, and without the confirmation of any Court, we invite attention to the third paragraph of said so-called assignment (page 545), which shows that Mr. Hostetter, as administrator, was dealing with himself under the form and guise of a corporation. Said clause

reads as follows:

"3rd. To receive the payment of the said sum of " $81,000.00, and also to indemnify and save harmless " the said administrator from all loss, cost or expense " by him incured or suffered for, or by reason of the " making of this contract, and the execution of the " same, each and every one of the stockholders of the " said Hostetter Company, shall simultaneously with " the execution of this contract, assign and transfer to " the said administrator, each and every share of " stock owned by him or her, except one share which " shall be retained by each stockholder who is a mem- " ber of the board of directors. The said share shall " be held by said stockholder only for the purpose of " qualifying him or her to act as a member of the " board, and shall, on demand of said administrator, be " assigned and transferred to him for the same purpose " as the other stock."

The reason is apparent why Mr. Robb confined himself to the substance of this assignment when he gave his deposition (pages 50–51), but it further appears that M. L. Myers was a partner of D. Hostetter and no assignment is shown from Mr. Myers, but an attempt is made to show that Myers acquiesced in this proceeding. Thus Mr. Robb in his testimony (page 51) states that Myers was a nominal partner and that the assignment was attested to by the seal of the company, and the signature of the secretary, M. L. Myers, and that M. L. Myers was the same man who

was the nominal partner in the firm of Hostetter & Company, but when the copy of the assignment is produced the name of Mr. Myers does not appear as secretary or in any capacity (pages 51 and 545). The only parties thereto are "D. Herbert Hostetter administrator" and "The Hostetter Company, by D. Herbert Hostetter, Prest." In this connection we call the Court's attention to the case of *Blankman* vs. *Vallejo*, 15 Cal. 638. The opinion being by Judge Baldwin, Field, J., concurring:

> "We do not understand that the credulity of a Court must necessarily correspond with the vigor and positiveness with which a witness swears. A Court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statement, the inherent improbability of a statement may deny to it all claims to belief."

Mr. Robb's statement that the good-will of appellee was worth $1,000,000.00 should be absolutely disregarded, and the Court should find that complainant has not brought itself within the $2,000.00 statutory jurisdiction of the Circuit Court because if the good-will had been of any value, it is fair to assume that such valuation would have been fixed in the so-called assignment.

> "The good-will of a business is property, transferable like any other."
>
> *Cal. Civil Code*, Section 993.
>
> "One who sells the good-will of a business, thereby warrants that he will not endeavor to draw off any of the customers."
>
> *Cal. Civil Code*, 1776.

One partner has not the right to transfer or dispose of the good-will of the business. *Cal. Civil Code*, Section 2430. These are elementary principles, and we think it apparent that the appellee never acquired any title to the formula and good-will of Dr. J. Hostetter's Stomach Bitters. There was not even an attempt to prove that D. Hostetter ever acquired the title of Dr. J. Hostetter in and to said bitters. If D. Hostetter, through whose estate depends appellee's title, had any title, it would have been a simple matter for appellee to have shown that fact, and the omission of any such testimony is not only a failure of proof, but the Court must presume that no such testimony was in existence, or that appellee wilfully suppressed it, because it was adverse. *Cal. C. C. P.*, Section 1963, sub. 4, 5 and 6. There was also a predecessor known as Hostetter & Smith (p. 32). No title is deraigned from that firm (pp. 52, 43, 44).

We respectfully, but earnestly submit that the depositions taken in Pittsburg, should be suppressed, and we ask the Court to inspect the depositions in the cases Nos. 12,779, 12,780, 12,786, 12,787, 12,790, 12,793 and 12,794 with which this cause was argued and submitted in the Circuit Court (page 566). We think the taking of these depositions was unfair and improper. It needs no discussion that when a notice is served in San Francisco on the 2nd day of October, 1899, of taking a deposition in Pittsburg, Pennsylvania, on October 13th, 1899, and the deposition thus noticed for October 13, in the absence of the opposite party, is taken on the 9th day

of October, that such deposition must be suppressed. Again notice is given of the taking of the deposition of D. Herbert Hostetter. His deposition was not taken, but another witness was substituted for him; certainly that of itself should be sufficient to suppress the deposition. Again the taking of the second deposition, which, as we have before stated, is an exact duplicate of the first, was noticed for December 7th, 1899, and purports to have been taken on December 18th, 1899. It is true there is a recital (page 65) as follows: "And " now, to-wit: December 7th, 1899, the taking of depo- " sitions under said notice is postponed until December " 18th, 1899, at the same time and place, no one having " appeared on behalf of defendant and counsel for com- " plainant having so requested." But we submit that such an adjournment was improper (*Weeks on Depositions*, Sec. 322), and beyond the jurisdiction of the notary whom appellee selected to take the depositions, and that an inspection of the depositions shows that the witnesses did not in fact appear and give their depositions in December, for it is incredible that an oral deposition will be given in October, and that two months later the oral deposition of the same witness will be taken, in which the identical questions are asked, and the witness gives the identical answers, that the witness is interrupted by counsel in the same parts of his answers in giving his deposition in December as he was in giving his deposition in October. Even the same punctuation marks appear, showing

that the typewritist slavishly copied all the depositions from one model. Where was this model obtained? Appellee revels in litigation, and this model may have been used for years.

These depositions were taken under Sections 863, 864, and 865 of the U. S. Revised Statutes. These statutes have always been strictly construed. In *Bates on Federal Equity Procedure*, Volume 1, Section 404, it is said:

> "The authority to take depositions in the manner allowed by the statutes stated in the three sections next preceding, being in derogation of the rules of the common law, has always been construed strictly, and therefore it is necessary to establish that all the requisitions of the law have been complied with before such testimony is admissible. The conditions under which a party is permitted, and a magistrate is authorized, to take depositions *de bene esse* under this act are: (1) that the witness lives a greater distance from the place of trial than one hundred miles; or (2) is bound on a voyage to sea; or (3) is about to go out of the United States; or (4) is about to go out of the district to a greater distance from the place of trial than one hundred miles; or (5) is ancient or very infirm. The magistrate is required to deliver to the court, together with the depositions so taken, a certificate of the reasons of their being taken, and of the notice, if any, given to the opposite party. In order to entitle the party to read such depositions when taken and certified in due form of law, he must show that at the time of the trial: (1) the witness is dead; or (2) gone out of the United States; or (3) gone to a greater distance than one hundred miles from the place where the court is sitting; or (4) that by reason of age, sick-

ness or bodily infirmity, or imprisonment, he is unable to travel and appear in court. The authority or jurisdiction conferred on the magistrate by this legislation is special, and confined within certain limits or conditions, and the facts calling for its exercise should appear upon the face of the instrument, and not be left to parol proof. The statute requires them to be certified by the magistrate. Where notice is required to be given to the opposite party, such notice should show on its face that the contingency happened which confers jurisdiction upon the magistrate, and gives a right to the party to have the deposition taken, so that the party on whom the notice is served may be able to judge whether it is necessary or proper for him to attend."

The authorities hold that the omission of the officer taking the deposition to certify that he reduced the testimony to writing himself, or that it was done by the witness himself, in his presence is fatal to the deposition, and that such facts will not be presumed, but must clearly appear from the certificate, and that the officer must certify that he reduced the deposition to writing in the presence of the witness.

Cook vs. *Burnley*, 11 Wall. 659;
U. S. vs. *Smith*, 4 Day 126;
Bell vs. *Morrison*, 1 Pet. 355;
Donahue vs. *Roberts*, 19 Fed. 863;
Marstin vs. *McRae*, Hempt. 688;
Rainer vs. *Haynes*, *Id.* 689;
Thorpe & Burton vs. *Simmons*, 2 Cranch. 195;
Ex parte Fisk, 113 U. S. 713.

The certificate of the notary in neither deposition conforms to the statute. The notice upon which the

deposition purports to have been taken on December 18, 1899, states that the testimony would be taken in shorthand, and afterwards reduced to writing upon a typewriting machine (page 94). The appellant declined to waive any of the provisions of the statute (page 95), but the certificate of the notary recites (page 90): "That said depositions were given in my presence and "taken stenographically, and thereafter signed by the "respective witnesses, and their said depositions are "now herewith returned."

It may be noted that the certificates do not show, nor was there any proof offered to the effect that the witnesses named in said depositions were not within one hundred miles of San Francisco at the time of the trial of the cause.

Under Section 354 of the *Penal Code* of California any person who refills a bottle having in any way connected with it the duly filed trade-mark or name of another for the purpose of disposing of the same to deceive or defraud, is guilty of a misdemeanor. The appellant's officers and salesmen are entitled to the presumption of innocence. The burden of proof was upon appellee.

As opposed to the testimony of the two men who were hired by appellee to obtain testimony, and in the giving of which they displayed careful drilling, we have the testimony of Mr. Paul Samuel, who sold the bitters to them. Mr. Samuel's testimony was given in such a manly, straightforward manner that counsel for ap-

pellee did not cross-examine him. After stating that he was the person who sold the bitters, he testified (pages 231 to 237):

" A. They came into the store. I was in the store " and walked up to them and asked them what they " wanted. They asked me if we sold any liquors. I " told them yes, we sold liquors and wine. 'Have you " any Tokay wine?' they asked. I told them yes, we " had Tokay wine. He asked me the price of the wine. " There was some wine being shipped that day, lying " on the sidewalk, marked 'Tokay', and I asked them " if they wanted to see a sample. They said yes. I " showed them a sample, which was satisfactory, and " told them the price would be $1.50 a gallon. They " said, 'All right, we will take some,' and I believe they " took a gallon or a half gallon. They then asked me " if we had any Hostetter's Bitters. I told them yes, " we have Hostetter's Bitters. They asked me how " much we charged for Hostetter's Bitters. I told them, " 'You wait a minute; I will go and see,' and walked in- " side, and looked up the cost, and quoted them $8.50 " for the bitters a case. They did not seem to be satis- " fied with that figure, and asked if it was a fact that " these bitters were sold for less sometimes; and so I " said, 'If Hostetter's Bitters are too high we have a " 'bitters that will suit you just as well as Hostetter's " 'Bitters.' He said, 'Yes, what do you charge for " them?' I said, 'We get $2.25 a gallon for them.' I " said, 'They are called H Bitters; we sell them for H

" Bitters.' So they said, 'Well, we will take a half gal-
" lon of those bitters.' I sent my order downstairs, and
" told the cellar-man to put up a half gallon of H Bit-
" ters. He brought them up. They asked me to tag
" the bitters. He tagged the bitters, and put 'H Bit-
" ters' on them, one-half gallon of H Bitters. They
" then asked me if I couldn't let them have an empty
" bottle. I asked what kind of a bottle. They said,
" 'We would like to have a bitters bottle.' I said, 'This
" 'is not the place to get bitters bottles. If you want an
" 'empty bottle the place to get it is in a junk shop; we
" 'have not got them.' I said, 'Sometimes a saloon fails
" 'on us, and we get a lot of goods, of bottles half empty
" 'and three-quarters empty, which we take out of the
" 'place and bring down here, and among those we
" 'might have a Hostetter's Bitters bottle;' and he says,
" 'We would like to have one of those bottles.' So I
" told the boy to bring a bitters bottle. The boy came
" down, and said he didn't have anything but a Lash's
" Bitters bottle. I said, 'A Lash's Bitters bottle
" 'will do; any kind of a bitters bottle will
" 'do.' He said, 'All right.' In the meantime the other
" boy upstairs had heard the conversation, and said,
" 'I know where there is a Hostetter's Bitters bottle,'
" and brings down a Hostetter's Bitters bottle. They
" paid me for the invoice. That is all. They left the
" store.

" Q. 12. Did you suggest to them that these H
" Bitters were Hostetter's Bitters, or genuine Hostet-

" ter's Bitters sold by the complainant or made by " them?

" A. No, sir; I told them that the bitters were bet- " ter than Hostetter's Bitters. They were a bitters " better than Hostetter's Bitters, and naturally tried to " sell my own bitters.

" Q. Did you suggest to them in any way that they " should get the Hostetter's Bitters bottle, and fill them " up with your bitters, and palm them off on the pub- " lic?

" A. No, sir; they asked me for a bottle, and I gave " them a bottle.

" Q. 14. Was there any other conversation at that " time besides what you have related?

" A. None whatever.

" Q. 15. If these witnesses said that you told them " to fill up the Hostetter's Bitters bottle with your H " bitters and to palm it off on the public, is that true or " false?

"A. They don't tell the truth.

" Q. 16. And you have related the entire conversa- " tion?

"A. Yes, sir; as it transpired.

" Q. 17. Did you say anything to them, anything " similar to this language: 'I will tell you fellows " 'something as you are new in the business. We " 'wouldn't handle Hostetter's Bitters if we couldn't " 'also sell them in bulk. The same company that puts " 'up the case goods also sells them in bulk?'

" A. That is entirely manufactured. I didn't say " anything of the kind.

" Q. 18. Or anything to that effect?

" A. No, sir.

" Q. 19. Do you recollect a second purchase, on or " about the 6th of April, 1899, and what took place?

" A. I remember the same two gentlemen coming " back into the store and they wanted some more wine. " I believe I asked them what they wanted. I believe " they wanted Tokay wine again; yes, sir, it was Tokay " wine again, and some other wine. I gave them the " price and they ordered it. Then they again asked " me if I wouldn't sell them one-half gallon of H Bit- " ters. I said certainly and gave an order for one-half " gallon of H Bitters.

" Q. 20. What conversation did you have at the " second interview?

" A. They asked for another bottle, another empty " bottle. I again asked the boy whether he could not " hunt up a bottle, and it took him some time to hunt " it up. He said that we had none, and there was a " bottle with lead in it, lead that we use in cleaning " bottles, and which was put in there so it would not be " lost, and asked me if he should empty that out, and " if this bottle would do. I told him any kind of bottle " would do. They said yes, any bottle would do. He " brought a bottle down and I handed it over to him.

" Q. 21. Was that a Hostetter's Bitters bottle, the " second bottle?

"A. I know it was a bitters bottle; a Lash's, or it "might have been a Huffland Bitters bottle with the "label on it. I don't recollect what kind of a bottle it "was. I didn't handle that bottle myself. I don't "recollect if there was a Hostetter's label on that bottle. "I knew it was a bitters bottle because they asked me "for a bitters bottle.

"Q. 22. There are a great many different kinds of "bitters?

"A. Yes, sir; a great many.

"Q. 23. Are there any different kinds of bitters "commencing with the letter "H" as an initial of the "name of the bitters?

"A. I know a great many, yes, sir.

"Q. 24. Tell me a few?

"A. There is Huffland; Dr. Hanley's; Highland "Bitters; Herb Bitters; Hoff Bitters; Hamburg Bitters. "Those are all bitters on the market.

"Q. 25. In addition to that there are a great many, "you may say, hundred of varieties of bitters?

"A. Exactly like patent medicines, of all kinds.

"Q. 29. Did you know of the defendant ever refill-"ing any bottle of Hostetter's Bitters?

"A. I know it was never done.

"Q. 30. Never filled any bottles?

"A. No, sir.

"Q. 31. Never put in empty Hostetter's Bitters "bottles—never put any bitters in them and called "them Hostetter's Bitters and sold them as such?

" A. Certainly not.

" Q. 32. Do you know whether there is an essence " of H Bitters sold in the market?

" A. Yes, sir; there is an essence of bitters sold.

" Q. 33. Been on sale a great many years?

" A. Yes, sir; long before I was born, I guess.

" Q. 34. Well known to the trade?

" A. Yes, sir; anybody could buy it.

" Q. 35. These H Bitters have been sold in this " market for a great many years?

" A. A great many years. We have been buying " it ever since we have been in business.

" Q. 36. They have been a subject of barter and " sale publicly?

" A. Yes, sir.

" Q. 37. There has never been any attempt by any- " body to disguise them or claim them to be other than " H. Bitters?

" A. We billed them as such.

" Q. 38. They are billed to you as such and you " bill them as such?

" A. Yes, sir.

" Q. 39. And the public generally has been selling " them as H Bitters for years?

" A. A great many years.

" Q. 40. When you say a great many years, you " mean long before you were in business?

" A. Before I was in business.

" Q. 41. Probably long before you were born?

" A. Yes, sir."

Complainant's Exhibits 1 and 6 substantiate Mr. Samuel's testimony. The first shows a sale of one-half of a gallon of H Bitters. The second simply a sale of one-half gallon of bitters (p. 588, 589).

There is absolutely no evidence to support the charge of fraud in the bill of complaint. There is no dispute that when appellee's paid employees went to appellant's place of business and asked for Hostetter's Bitters they were tendered appellee's compound, and were told that it cost $8.50 per case. Appellee's detectives so testified, and Mr. Robb testifies that $8.50 per case is the price at which they desire the bitters sold (pp. 37 and 38), and for which they allowed the jobber a discount or rebate of 10%. The sales by appellant of bitters are very small, and all the witnesses testify that for some purpose Mr. Samuel went into the office. Mr. Samuel says he went into the office to ascertain the price of Hostetter's Bitters. Appellee's witnesses state that after receiving the price of $8.50 per case, they stated that they thought it was "pretty high", and that then Mr. Samuel went into the office, and on his return suggested the buying of the bulk bitters. That Samuel should have been able to carry the price of $8.50 per case in his mind, and yet be compelled to go to the office to find out about the bulk bitters is remarkable. Certainly if he had been in the habit of selling the bulk bitters, there would not have been any necessity for him to go to the office to learn anything

about them.

It appears that appellee's detectives made reports to one of appellee's solicitors. The thirtieth of these reports was introduced in evidence by appellants as its exhibit No. 1 (pp. 590 to 593).

One of the disadvantges of the trial of equity cases is that the Court cannot see the witnesses, observe the manner in which they testify, and thereby to judge which witness is telling the truth, when the testimony is conflicting. So far as cold type may photograph an occurrence the production of appellant's Exhibit No. 1, thoroughly discredits Mr. Morrison's testimony. We particularly request the Court to read this testimony from page 142 to page 157.

The testimony as given by Mr. Samuel, and the language he used in testifying, shows that he did not make use of the language stated in appellant's Exhibit No. 1. Mr. Samuel's testimony shows that he is careful in the choice of words, is refined in manner and demeanor, and we submit appellant's Exhibit No. 1 without comment as an exhibit of the type of men appellee employed to discover testimony and unearth fraud.

S. P. Co. vs. *Robinson*, 132 Cal. 408.

Litigation seems to be one of appellee's methods of advertising. On its label it says: "The best evidence " of the merit of an article is the disposition to produce " counterfeits, and we regard it as the strongest testi-

" mony to the value of Hostetter's Celebrated Stomach " Bitters that attempts of that description have been " frequent." There is a remarkable similarity between the testimony produced in the various cases in this and in other jurisdictions, and it is apparent that appellee regards litigation as a good advertiser.

Hostetter Co. vs. *Brunn*, 107 Fed. 707.

A fair reading of the testimony shows that the appellee through its agents and detectives did all of the inviting. That these agents were not *bona fide* purchasers, but laid a careful trap for appellant. That Mr. Samuel with manly generosity tried to accommodate appellee's agents, and that the particular sales to appellee's agents were the only instances in the course of appellant's large business that any person had ever obtained from appellant an empty Hostetter's Bitters bottle. The evidence shows without contradiction that appellant did not even have any such empty bottles, and that the bottle obtained by appellee's agents had been used for the purpose of holding shot, which, as a matter of common information is used in cleaning bottles.

The conduct of the appellee amounted to an express license to the appellant to perform the acts of which it is accused. There is nothing from which the inference of similar acts at other times can be drawn! Appellee solicited the tort, if any was committed, and cannot now complain of it. The maxim "*Volenti non fit injuria*" applies. If any fraud was committed it was committed by appellee, and its agents, and not by the appellant.

Lawrence Mfg Co. vs. *Tennessee Mfg. Co.*, 31 Fed. 776; 138 U. S. 537.

In the case of *Hostetter* vs. *Fries*, 17 Fed. Rep. 620, the Court used the following language:

> "The complainants have neither the exclusive right to make bitters compounded after the formula of Dr. Hostetter nor the exclusive right to sell bitters by the name of Dr. Hostetter's Bitters. The preparation never had any name until it was offered to the public and christened. When a new article is made a name must be given to it, and this name becomes by common acceptation the appropriate descriptive term by which it is known, and therefore becomes public property. If this were not so, any person could acquire the exclusive right to a formula by giving a name to the compound produced, not only when the compound has not been patented, but where it might not be the subject of a patent. All who have the right to manufacture and sell the preparation have the right to designate and sell it by the name by which alone it is known, provided care is observed to sell the preparation as the manufacture of the seller and not the preparation made by another."

This is cited and followed in

Hostetter vs. *Van Vorst*, 62 Fed. Rep. 600.

See also

Holzapfel's Comp. Co. vs *Rahtzen's Comp. Co.*, U. S. Sup. Ct. Oct. Term, 1901.

Consequently such a name may be used generally by all persons to designate a certain kind of article.

Smith & Davis Mfg. Co. vs. *Smith*, 89 Fed. 486.

As a result the name Hostetter is not indicative of

the origin of the article manufactured by appellee or of any particular person or firm engaged in making bitters, but the term is now public property, and any person may use the name Hostetter and its abbreviations to indicate stomach bitters, provided he does not imitate the labels, etc., of any other maker of Hostetter Bitters, or by any other fraudulent means intentionally attempt to palm off his particular manufacture of Hostetter Bitters as the Hostetter Bitters made by any other maker.

Hostetter vs. *Fries*, 17 Fed. 620;
Hostetter vs. *Van Vorst*, 62 Fed. 600.

How can the use of the letter H infringe any right of appellee, if the use of the whole name, Doctor Hostetter's Stomach Bitters, be not an infringement?

Hostetter vs. *Fries*, 17 Fed. 620;
Hostetter vs. *Van Vorst*, 62 Fed. 600;
Lewanberg vs. *Pfefele*, 52 N. Y. S. 801;
McLean vs. *Fleming*, 96 U. S. 245–252.

Since it is clear that there is no infringement of a trade-mark in this case, in order to entitle it to an injunction the appellee must make out a case of unfair competition. To establish such a case appellee must prove actual fraud and an intent to deceive the public.

Lawrence Mfg. Co. vs. *Tennessee Co.*, 138 U. S. 537-549.
Hostetter Co. vs. *Comerford*, 97 Fed. 585;
Hostetter Co. vs. *Bower*, 74 Fed. 235.

And a wrong to appellee by selling fraudulently other goods as those of appellee. Actual fraud is the essence of the wrong.

Day vs. *Webster*, 49 N. Y. S. 314,

and must be actually shown.

Gaines & Co. vs. *Leslie*, 54 N. Y. S. 421;
Proctor Gamble Co. vs. *Globe Ref. Co.*, 92 Fed. 357;
Lawrence Mfg. Co. vs. *Tenn. Manf. Co.*, 138 U. S. 537–549.

This intent might be shown, as by example, by a colorable imitation of appellee's label; but where there is no question in a case of the infringement of a technical trade-mark or a colorable imitation of a label, then appellee must show fraud, and an actual deception, by palming off on the public the goods of appellant for those of appellee.

Brown on Trade-marks, Sec. 43;
26 Am. & Eng. Ency. of Law, 445.

Nothing less will suffice. It is not sufficient to prove that a dealer has been selling an imitation provided he sells it as an imitation and the vendee is not deceived.

> "A fraudulent intent is of the essence of unfair competition in trade, and where a manufacturer believes a dealer to be selling the goods of another as his, he should give such dealer notice, and an opportunity to desist before bringing suit."

Gorham Man. Co. vs. *Emery-Bird-Thayer*, 92 Fed. 774;
McLean vs. *Fleming*, 96 U. S. 245 at 254, 84 Fed. 215.

In this case the appellee has neither alleged nor proved any notice or warning of any kind to this appellant; consequently it is not entitled to an injunction or the above cases must be overruled in terms. The doctrines of these cases appeal to reason and to settled doctrines of equity.

It was held in *Hostetter* vs. *Bower*, 74 Fed. 235, that the testimony of witnesses hired to secure evidence was to be scrutinized with unusual caution,

Hostetter vs. *Comerford*, 97 Fed. 585;
Hostetter Co. vs. *Brunn*, 107 Fed. 707.

The case of *Gorham* vs. *Emery*, *etc.*, 92 Fed. 774, is very much in point. In that case plaintiff sent an agent to the store of defendant to obtain evidence of an infringement and induced the clerks in the store to falsely mark upon the sales bills delivered so as to indicate that the articles sold was of the Gorham Company's manufacture, though the agents had been distinctly told by the clerk that it was not. The Court said:

> "Nobody was deceived or defrauded into the sale claimed to have been made to the detective sent to the defendant's store to get evidence. They knew exactly what they were getting; the conduct of complainant's agent who by deceit and duplicity induced the saleswoman to mark on the sale tag the word 'Gorham' shows that his intent and purpose were to procure a wrongful act to make it the basis of a lawsuit. A man who procures another to slander him cannot make it the basis of an action for damages. This is based upon a fundamental principle of the law. No person has the right to en-

> trap another by false and fraudulent appearances in order to induce an act on which to base a claim for damages in a court of justice. How much more should the rule apply in a court of equity, which in its search after justice looks into the very heart to define the motive?"

In this case the witnesses for appellee were not deceived and did not intend to buy Hostetter's Bitters. There is no evidence in this case of any intention on the part of appellant or any of its agents to impose upon any one or deceive any one. Nor is there any evidence except the guess-work of these two hired detectives that anybody would be fooled or deceived or misled under the circumstances under which these purchases were made, into believing or thinking that they were buying the bitters made by appellee, when they refused to buy them because they were too expensive. The essential element of unfair competition is entirely lacking in this case.

The evidence shows that Hostetter's Bitters are never sold in bulk, but always in bottles, with label and glass blown, and the evidence conclusively shows that all of the Bitters sold by appellant were sold in bulk in demijohns, contained in demijohns, nothing on the demijohns or anything else to show that they were or pretended to be anything manufactured by appellee. Appellant "discharges his full legal duty when he so " dresses his product that one who seeks to know " whose manufacture it is can readily learn by reasona- " ble examination" and that it was not the manufacture

of this appellee.

Centaur Co. vs. *Gardiner*, 97 Fed. 785;
Holzapfel's Comp. Co. vs. *Rahtjen's Comp. Co.* (*supra*).

There was absolutely no deception of any kind, nature or description in this case. Appellee failed to give any notice or warning that its rights were being infringed upon, and therefore it is not entitled to any relief under the authority of *Gorham Manufacturing Co.* vs. *Emery etc.*, 92 Fed. 774, and *McLean* vs. *Fleming*, 96 U. S. 254.

The evidence as to the value of the bitters is not the best evidence. The best evidence, of course, was the formula, and the legal presumption is that the best evidence, if produced, would have been unfavorable to the appellee.

Cal. C. C. P., Sec. 1963, Sub. 5;
Laird vs. *Wilder*, 9 Bush (Ky.) 131, 134–137;
s. c. 15 Am. Rep. 707, 710, 711.

In the last case it was said (page 711):

> " In addition to all these facts the utter failure of the appellant to prove the ingredients of this questionable drug of his is a significant and cogent circumstance against him."

It is no excuse that the formula is a trade secret, as a matter of fact the formula is well known, and is to be found in all druggists' books.

Standard Formulary, 10th ed., 1899, Albert E. Ebert, A. Emil Hess, p. 225.

But if it were a trade secret still this would be no excuse.

Hostetter Co. vs. *Comerford*, 97 Fed. 585, 586, where the Court said:

> " It is the complainant's misfortune in a case of this character that the formula under which it manufactures is a trade secret, and is, therefore, never produced. But when fraud is charged the Court cannot close its eyes to the fact that the complainant has in its possession proof which will remove all doubt, and withholds it for its own advantage."

We gave appellee ample opportunity of disclosing the formula by demanding it from the witness Robb on cross interrogatories

We respectfully refer the Court to the label, almanac and advertisements introduced in evidence to show the extravagant, inconsistent and incredible claims of the appellee. Even its own witness Dr. D'Homerque said that these were exaggerations.

In *Krauss* vs. *Peebles*, 58 Fed. 585, a distiller mixed 35% of other whiskey, bought with the purpose with his own brand, and sold it under his own label as his own product. Recovery against an infringer was denied on account of the misrepresentation. It was admitted that the purchased article was as good as he manufactured, but that was held not to justify the fraud on the public.

If this is a fraud *a fortiori*, it is a fraud for one to mix with an alleged medicine 43% of a liquor which

the medicine is not represented to contain, and which is positively injurious to many people and in many instances.

Holzapfel's Comp. Co. vs. *Rahtjen's Comp. Co.*, (*supra*)
Manhattan Medicine Co. vs. *Wood*, 108 U. S. 218;
Hilson vs. *Foster*, 80 Fed. 896;
American Cereal Co. vs. *Pettijohn Cereal Co.*, 72 Fed. 903;
Coleman vs. *Dannenberg Co.*, 30 S. E. (Ga.) 869;
Chapman vs. *State*, 27 S. E. (Ga.) 789;
Mitchell vs. *Commonwealth*, 51 S. W. (Ky.) 17;
Brown Chemical Co. vs. *Meyer*, 139 U. S. 540;
Schmidt vs. *Brieg*, 100 Cal. 673;
Burton vs. *Stratton*, 12 Fed. 689;
Ginter vs. *Kinney Tobacco Co.*, 12 Fed. 783;
Leather Cloth Co. vs. *American Leather Cloth Co.*, 4 DeG. J. & S. 137;
s. c. on Appeal, 11 H. L. Cas. 523;
Clotworthy vs. *Schepp*, 42 Fed. 62;
Alden vs. *Gross*, 25 Mo. App. 128;
Connell vs. *Reed*, 128 Mass. 477;
Siegert vs. *Abbott*, 61 Md. 276;
Seabury vs. *Grosvenor*, 14 Blatchf. 262;
Fetridge vs. *Wells*, 13 How. Pr. 385;
Phalon vs. *Wright*, 5 Phila. 504;
Prince Manfg. Co. vs. *Prince M. P. Co.*, 125 N. Y. 24.

In *Holzapfel's Comp. Co.* vs. *Rahtjen's Amer. Comp. Co.*, *supra*, opinion filed Oct. 2nd, 1901, the U. S. Supreme Court says:

" We are of opinion that no valid trade-mark

was proved on the part of the Rahtjens, in connection with the paint sent by them from Germany to their agents in the United States prior to 1873, when they procured a patent in England for their composition. It appears from the record that from 1870 to 1879, or late in 1878, the paint was manufactured in Germany by Rahtjen, and sent to the United States in casks or packages marked 'Rahtjen's Patent Composition Paint'.

" Prior to November, 1873, the article was not patented anywhere and a description of it as a patented article had no basis in fact, and was a false statement tending to deceive a purchaser of the article. No right to a trade-mark which includes the word 'patent', and which described the article as 'patented', can arise when there is and has been no patent; nor is the claim a valid one for the other words used, where it is based upon their use in connection with that word. A symbol or label claimed as a trade-mark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, nor can any right to its exclusive use be maintained."

The Supreme Court of the United States says, in *Canal Company* vs. *Clark*, 13 Wall. 311:

"Nor can a general name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics be employed as a trade-mark, and the exclusive use of it entitled to legal protection."

To the same effect are the following cases:

Brown vs. *Meyer*, 139 U. S. 540;
Caswell vs. *Davis*, 58 N. Y. 223;
Manufacturing Co. vs. *Trainor*, 101 U. S. 54;
Gillman vs. *Hunnewell*, 122 Mass. 139;
Stokes vs. *Landgraff*, 17 Barb. 608;

Corwin vs. *Daly*, 7 Bosw. 222:
Amoskeag vs. *Spear*, 2 Sandf. 599.

As illustrating the rule and showing the extent to which it has been carried, it will be interesting to note the subjoined list of words which have been held to be descriptive:

"Iron bitters,"
Brown vs. *Meyer*, 139 U. S. 540.

"Sarsaparilla and iron,"
Schmidt vs. *Brieg*, 100 Cal. 673.

"Aromatic Schneidam Schnaps,"
Burke vs. *Cassin*, 45 Cal. 467.

"Desiccated codfish,"
Town vs. *Stetson*, 5 Abb. Pr. N. S. 218.

"Antiquarian book store,"
Choynski vs. *Cohen*, 39 Cal. 501.

"Ferro-phosphorated elixir of calisaya bark,"
Caswell vs. *Davis*, 58 N. Y. 223.

"Cherry pectoral,"
Ayer vs. *Rushton*, Codd. Dig. 229.

"Tasteless drugs,"
In re Dick & Co., 9 O. G. 538.

"Burgess' essence of anchovies,"
Burgess vs. *Burgess*, 3 De G. M. & G. 896.

"Balm of a thousand flowers,"
Fetridge vs. *Wells*, 4 Abb. Pr. 144.

"Club-house gin,"
Corwin vs. *Daly*, 7 Bos. 222.

"Extract of night-blooming cereus,"
Phalon vs. *Wright*, 5 Phila. 464.

"Liebig's Extract of meat,"
Meat Co. vs. *Hanburg*, 17 L. T. N. S. 298.

"Bees-wax oil,"
"*In re Hathaway*, Com. Dec. '71, p. 97.

"Invisible face powder,"
In re Palmer, Com. Dec. '71, p. 289.

"Razor steel,"
In re Roberts, Com. Dec. '71, p. 100.

"Mammoth wardrobe,"
Gray vs. *Koch*, 2 Mich. N. P. 119.

"Parson's Purgative pills,"
In re Johnson Co., 2 O. G. 315.

"Crack-proof India rubber,
In re Goodyear Rubber Co., 11 O. G. 1062.

"Croup Tincture,"
In re Roach, 10 O. G. 333.

"Cough remedy,"
Gillman vs. *Hunnewell*, 123 Mass. 139.

"Iron stone water pipes,"
In re Rader & Co., 13 O. G. 596.

"Nourishing stout,"
Raggett vs. *Findlater*, L. R. 17 Eq. 29.

"Angostura bitters,"
Siegert vs. *Findlater*, 7 Ch. Div. 801.

"Julienne soup,"
Godillot vs. *Hazard*, 49 How. Pr. 5.

"Parafin oil,"
Young vs. *Macrae*, 9 Jur. N. S. 322.

"Lackawanna coal,"
Canal Co. vs. *Clark*, 13 Wall. 311.

"American sardines,"
In re Sardine Co., 2 O. G. 495.

"Straight cut,"
Ginter vs. *Kinney T. Co.*, 12 Fed. 782

"Homeopathic Specifics,"
Medicine Co. vs. *Wenzm*, 14 Fed. 250.

"Cramp cure,"
L. H. Harris vs. *Stucky*, 46 Fed. 624.

It is beneath the dignity of a Court of equity to protect a quack medicine.

This principle was first enunciated, and a quack medicine defined, as one, the ingredients of which are not disclosed to the public, by Judge Kane, Circuit Judge of the Eastern District of Pennsylvania, in *Fowle* vs. *Spear*, Fed. Cases 4996; s. c. Cox's Am. Trade-mark Cases, page 67. This case was followed in *Heath* vs. *Wright*, Fed. Cases 6310; s. c. Cox's Am. Trade-mark Cases, page 154.

See also *26 A. & E. Ency. of Law*, 1st Ed., pp. 456, 458.

These cases were both cited without dissent by Hopkins in his work on Unfair Trade, Sec. 27.

See also *Smith* vs. *Woodruff*, 46 Barb. 438, 440, where the Court said:

> "It is a defense that ought to be suggested by the Court in some cases, and probably would be in all cases where the imposition is flagrant. For instance, where a quack compounds noxious and dangerous drugs, hurtful to the human constitution, and advertises them as a safe and sure remedy for disease; or when some charlatan avails himself of the prejudice, superstition, or ignorance of some portion of the public, to palm off a worthless article, even when not injurious, the case falls beneath the dignity of a Court of justice to lend its aid for the redress of such a party, who has been interfered with by the imitations of another quack or charlatan."

Wolfe vs. *Burke*, 56 N. Y. 115, 122, 123, where the Court refused to protect Schiedam Schnapps advertised as a medicine, upon the ground that it was merely an alcoholic stimulant.

The foregoing cases are cited and commended by Judge Shiras with his customary vigor in the case of *Kohler Manufacturing Co.* vs. *Beeshore*, 59 Fed. 572, in which he said:

> "It has been more than once held in this circuit that Courts of equity will not intervene by injunction in disputes between the owners of quack medicines, meaning thereby remedies or specifics

> whose composition is kept secret, and which are sold to be used by the purchaser without the advice of regular or licensed physicians."

Of course, the foregoing does not prevent the owner of a quack medicine from suing at law for damages upon a violation of his trade-mark, but it is not for a Court of equity where openness, fairness, ingenuousness plays so important a part to protect a compound whose ingredients are not disclosed, and which may be a menace to the public. Just after the time Judge Shiras sounded his warning to quacks, the New York Supreme Court met the question squarely in *Siegert* vs. *Abbott*, 25 N. Y. S. 590, 597, reversing the lower Court which had protected Angostura Bitters, a compound in the Hostetter Bitters category, but still older and more widely known. The Court said that if the bitters had no medicinal properties, and were only useful for flavoring wines and liquors, they should be so advertised and sold, and not as having medicinal merits, and added:

> "We do not think Courts of equity should be swift or vigilant to protect the manufacturer of a compound advertised and sold as a valuable medicine, which is not shown to contain a single medical ingredient, or to possess a single merit claimed for it, as against another manufacturer, producing and selling a like compound."

Among the reasons why equity should not protect a quack medicine are the following:

(1) Secrecy and concealment are insignia of fraud. If the formula is known and valuable the medicine may be patented, and the patent will afford all legitimate

protection. The formula may then be disclosed on the label and the medicine is then taken out of the quack category. The opposition of the medical fraternity to this method of imposing upon the public is causing all the better classes of proprietary remedies to be put upon the market with the formula printed on the label. The seller relies upon his name to sell the goods.

(2) Unless the Court declines to entertain any quack medicine cases, it is called upon, when the defense of fraud upon the public is raised, to go through a mass of secondary evidence such as is brought to the Court in this case. But if the formula were disclosed the Court and the public could tell instantly the value of the remedy.

(3) Unless the Court absolutely declines to consider these cases, equity, which is supposed to protect human rights, may work great damage to the public by unwittingly protecting a compound of the most vicious character.

(4) If equity does not discountenance such cases it tacitly invites all quacks to put up any noxious compound, and protects it until such time as some public benefactor discloses to the Court and the public its vicious nature, as we have been compelled to do in this case.

(5) There are laws against the practice of medicine without a license and yet the proprietor of a quack medicine, without disclosing the nature of his remedy,

prescribes it for a vast number of human ailments, and is paid therefor. A court of equity should not foster such a practice, which is essentially a violation of law.

(6) No man has a right to exploit human life. This is exactly what a quack does, putting up one remedy, prescribing it indiscriminately for a vast number of ailments without regard to symptoms, complications, or constitutional or organic weaknesses. It is in the nature of things impossible that what is good for one person under certain circumstances, will be good for another person under the same circumstances. Physiological differences are too great; and yet a multitude of quacks are constantly playing fast and loose with human life, gulling the credulous, imposing upon the weak and aggravating instead of ameliorating suffering. We respectfully submit that such people have no right to ask a court of equity to aid them in their nefarious practices.

As a special defense appellant contended and introduced a large amount of testimony for the purpose of showing that appellee's compound is nothing more than an alcoholic stimulant, or as it was phrased by Dr. Williamson, "an elaborate cocktail containing more ingred-" ients than the drink known by that name" (p. 340)

With reference to this defense, the distinguished Circuit Judge said in his opinion:

> "And with regard to this second contention, that the complainant preparation is of no value whatever, save as an intoxicating beverage, this state-

> ment appears to come at rather a late hour, considering the number of years it has been before the public and the numerous law suits in which it has been involved, wherein such a proposition would undoubtedly have arisen and been determined, if meriting attention."

We respectfully differ on this point with the able jurist, with whose opinions it has generally been our pleasure to thoroughly concur. We note a constant tendency in the Bar to mould litigation so as to bring it within the four corners of some adjudicated case. The constant multiplication of law books has a tendency to encourage the Bar to rely on precedent, and to disregard principle. We think such tendency should be discouraged, and the fact that a proposition has not been decided in some prior case should not foreclose discussion, nor lead to the conclusion that it is not meritorious.

Appellant is a whiskey dealer, and makes no pretense of being a believer in prohibition, or in total abstinence from the use of alcoholic stimulants. There are many persons, however, who believe in temperance as they believe in their soul's salvation, and it is a fraud upon such persons to give them alcohol and call it medicine. There are many persons with weak wills and strong appetites to whom an alcoholic beverage in the seductive form of an advertised medicine is a constant menace. It is the same menace to the reformed drunkard, who is trying to lead an abstemious life. It is also well known that a highly flavored alcoholic

stimulant such as Hostetter's Bitters is more likely to produce alcoholism than the ordinary stimulant.

Thompson on Practical Dietetics, p. 323;
Dr. Williamson's testimony (p. 328, 338).

Medicinally by a wineglass is meant four fluid ounces (p. 295) but the ordinary wineglass holds about twelve ounces (p. 296). The ordinary consumer uses the ordinary wineglass. Appellee prescribes its bitters from the directions on its labels as follows:

" One wine-glassful three times a day, before meals, " will be a swift and certain cure for Dyspepsia, Liver " Complaint, and every species of Indigestion — an " unfailing remedy for Intermittent Fever, Fever and " Ague, and all kinds of periodical disorders—a means " of immediate relief in Flux, Colics, and Choleraic " maladies—a cure for Costiveness—a mild and safe " invigorant and corroborant for delicate females—a " good, anti-bilious, alterative and tonic preparation for " ordinary family purposes—a powerful recuperant " after the frame has been reduced and attenuated by " sickness—an excellent appetizer as well as strengthener of the digestive forces—a depurative of the blood " and other fluids, desirable alike as a corrective and " mild cathartic, and an agreeable and wholesome stimulant."

Appellee's bitters were analyzed by Mr. Falkenau, a chemist of thirty-five years' experience in San Francisco, and found to contain 43% of absolute alcohol (p. 255). Whiskey contains from 40 to 50% of absolute

alcohol (p. 269). Professor Price, who was selected by the Court for the purpose of analyzing appellee's bitters found they contained alcohol by weight 36.56%, alcohol by volume 43.56% (p. 542).

J. M. Curtis & Son, of San Francisco, analyzed appellee's bitters with the following result (p. 528):

" J. M. Curtis. Marvin Curtis.

J. M. Curtis & Son,

Laboratory of Organic Chemistry,

129 California street, Telephone Green 91.

No. 4360.

San Francisco, Nov. 10th, 1899.

Analysis of sample of Hostetter's Bitters purchased by us, October 23, 1899, from Mack & Co.

Specific Gravity at 60 Deg. Fah.....	.96135
Alcohol by volume (including volatile oil of wormwood).....	43.110 per cent.
Dry Extract	4.490 per cent.

The Dry Extract contains:

Invert sugar.....	.590 per cent.
Cane sugar....	3.420 per cent.
Ash.	.019 per cent.
Free acid (calculated as malic)	.009 per cent.
Albuminoids	.044 per cent.
Ether Extract (fat).....	.008 per cent.
Alcohol extract, containing the bitter principle.....	.260 per cent.

Resin, coloring matter, etc. of wormwood, undetermined (suspended matter, cellulose, gums, etc.) by difference.....	.140 per cent.
Total Extract	4.490 per cent.

J. M. Curtis & Son. "

An alcoholic stimulant is contra indicated in most of the diseases for which Hostetter Bitters are prescribed by appellee in its almanacs, in its printed advertisements (p. 594, 595, 596, 597), and in its labels. Every standard medical work on the subject contradicts the claims and pretenses of appellee.

We have the testimony of San Francisco doctors to the effect that a wineglass full of liquor 43% of which is absolute alcohol, taken three times a day before meals is liable to produce cirrhosis of the liver, and fatty degeneration of the kidneys (p. 294). That indigestion and dyspepsia, as the terms are popularly used, result from overeating, and from the overdrinking of some stimulant (p. 297). That in all liver troubles alcohol is strictly prohibited (p. 301), that in cases of rheumatism, gout, kidney and bladder troubles alcohol should not be prescribed. That appellee's compound is an alcoholic stimulant (p. 307) which has a tendency to produce a false appetite, and to cause overeating and overdrinking. That absinthe and wormwood are the same thing, and taken in quantities have a tendency to insanity.

Lloyd M. Robbins, an attorney at law, twenty-five years of age, drank two and one-half prescriptions of appellee's bitters. That is, at five intervals of fifteen minutes, he took one-half the quantity prescribed by appellee on its labels. As a result he fell asleep, and suffered from headache two days thereafter (pp. 361, 362). From his own experience, and from what others had told him, he testified that appellee's bitters are more intoxicating than the same amount of whiskey (p. 367).

The testimony shows that appellee's bitters are particularly dangerous to women (p. 342).

Dr. Williamson testified (p. 348) that bitters are preferably given without alcohol.

Appellee made an unsuccessul attempt to meet this evidence, which testimony it took in the east, without any showing that expert testimony could not be produced in California. It produced an analysis of Mr. Wuth (p. 399), showing the quantity of alcohol to be 35.15%, but the analysis, though purporting to be made by an expert, does not show whether he refers to weight or volume, and he evidently referred to weight from the analysis of Professor Price, who was named by the Circuit Judge for that purpose. We call the Court's attention to a conflict between the opinion of the Circuit Court in the case at bar, and the opinions of other circuits as shown by the cases reported in 10 Fed. 838; 17 Fed. 621; 62 Fed. 600; 74 Fed. 235 and 97 Fed. 585, and assume that, if requested, this Court

will certify the questions herein to the Supreme Court.

In conclusion we call the Court's attention to the fact that appellee is self-convicted of selling an alcoholic stimulant. It admits that the bitters sold by appellant are so much like its own in color, taste and smell that only an expert may distinguish them. Of course, the ingredients make this similarity and the two are practically identical. The bitters bought from appellant are admittedly an alcoholic stimulant. Therefore the appellee's bitters must be an alcoholic stimulant. In addition the appellee is suing a liquor house for unfair competition. If the appellee was selling its bitters solely as a medicine, the acts charged against the appellant would not amount to competition. People do not buy medicine at liquor stores, put up in one-half gallon demijohns. It is notorious that appellee's alleged medicine is sold as a substitute for liquor in prohibition districts.

We respectfully submit that the decree of the Circuit Court should be reversed, and the bill dismissed.

R. H. COUNTRYMAN,
Solicitor for Appellant.

No. 788.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUELS BROS. & COMPANY
(a corporation),
Appellant,

vs.

THE HOSTETTER COMPANY
(a corporation),
Appellee.

Appellant's Supplemental Brief.

R. H. COUNTRYMAN,
Solicitor for Appellant.

Pernau Bros. Print, 543 Clay St., S. F.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUEL BROS & COMPANY (a corporation), Appellant, vs. THE HOSTETTER COMPANY (a corporation), Appellee.	No. 788.

APPELLANT'S SUPPLEMENTAL BRIEF.

Supplementing the oral argument which was made in this case, and in reply to the brief submitted by appellee, we wish to call the attention of the Court to certain matters which have not heretofore received the attention which they deserve, and which the importance of the questions here involved merits.

The more we consider this case, the more firmly are we convinced that the appellant is entitled to a reversal.

Evidence of Fraud.

The meager evidence of the appellee on all the issues involved and the total absence of any showing by complainant of any evidence of fraud on the part of

the appellant, while the burden to show fraud was irresistibly upon the complainant, makes the complainant's case an exceedingly weak one.

It will be remembered that all the evidence by which fraud was sought to be shown was adduced by two hired spies, paid by the appellee to secure evidence, at so much per day. If they did not secure evidence, they did not earn their money, and it is no wonder that under such circumstances they secured, or at least produced the evidence.

The gravamen of appellee's contention is that when an intending purchaser of Hostetter's Bitters entered appellant's store, instead of giving him Hostetter's Bitters, manufactured by the Hostetter Company, appellant gave him other Bitters, representing it to be appellee's Bitters, and suggesting that the purchaser sell it as and for appellee's Bitters. There is no such evidence. The appellant, when first approached for Hostetter's Bitters, set out the genuine Hostetter's Bitters in bottles. If there had been any attempt on the part of the appellant to run appellee's goods out of the market, the appellant's own goods would invariably have been first set forth; but in not one instance was this the case. The genuine goods were always produced, and it was not until these spies, in their mad desire to secure evidence, objected to the price, suggested bulk Bitters, asked for an empty bottle, and purposely and detestably trapped the appellant into producing bulk Bitters in order to manufacture evidence, that any sale was made. There is no proof of a single sale to any bona fide purchaser of any but the

Hostetter's Bitters manufactured by appellee. The spies never wanted these Bitters. They admitted in their testimony that they did not; they came for bulk Bitters, and for bulk Bitters only. Evidence of sales to these spies is the only evidence introduced. There is not a hint that appellee ever heard that the appellant was unfairly competing with appellee. There is not a scintilla of evidence that appellant ever tried to induce a bona fide purchaser to take any other Bitters than appellee's Bitters. Cases are cited in our Opening Brief showing that the testimony of these spies is to be received with extreme caution, and when we remember that they lied to appellant, giving the name Hatch instead of their own names (Tr. pp. 182, 588), and saying they had broken the bottle, which they had not (Tr. pp. 199, 200), it is fair to deny that they told the truth to the examiner. It will be remembered that appellee's counsel stated in open court that one of these spies was "in California " for his health". Why not give him Hostetter's Bitters instead of climate? Probably his hard swearing on the eastern circuits had made him ill.

Appellee Suggested Fraud.

Every act of the appellant which the appellee has cited as fraudulent took place at the direct instance and request of the appellee's agents.

These requests of the appellee to do these acts amounted to an express license to appellant to do them, and having caused the acts to be committed, having brought them about solely through its own scheming, it cannot now be heard to complain of them, nor to take

advantage of its own wrong.

We trust that the irresistible force of this position will appeal to the Court, and are certain that the decisions cited in our Opening Brief to support it amply justify our faith in the position.

It would seem enough to prejudice appellee's case that the local evidence was gained entirely by spies; that one of the two was temporarily in the employ of Redington & Co., the local distributor of the appellee, until just after the trial, so as to give him a sort of prestige as being connected with the direct trade, and also to keep his testimony in line; while immediately after the trial he was discharged, and has not since been with that company.

Appellee's Fraudulent Depositions.

But there is another and still more damaging matter connected with this case, and with all the other cases tried with it in the Circuit Court; that is, in connection with the opening depositions taken by the appellee in Pittsburg, an argument against which is contained in our Opening Brief, pages 7 to 12, the depositions themselves being set out in the Transcript, pages 30 to 105. It appears that in 10 different cases pending in the lower Court, and numbered 12779, 12780, 12785, 12786, 12788, 12789, 12790, 12791, 12792 and 12793, depositions were taken by appellee of the same witnesses, by the same officer and conducted by the same counsel, at the hour of 10 o'clock A. M. on October 9th, 1899; that these depositions are fac similes and many are even carbon copies; there was not even a change in the punctuation marks.

On December 18th, 1899, depositions numbered 12782, 12783, 12784, 12786, 12787, 12790 and 12791 were taken at 10 o'clock A. M.; exactly the same witnesses were examined before the same officer and by the same counsel in each of said causes, and all at the same minute of time. The examining officer and the witnesses charged full rates for their services in each one of the cases, and the depositions taken on this date are all in *haec verba* as the depositions taken on October 9th. Ten depositions going on at the same minute on October 9th, 1899; seven depositions at the same minute on December 18th, 1899! and yet counsel put these forth as fairly taken in each case.

What does this mean? Simply that when the hour for taking depositions arrived, and the defendants did not appear, counsel took from a musty pigeon-hole one of the depositions taken in the numerous manufactured cases which appellee has conducted by way of advertising (*Hostetter* vs. *Brunn*, 107 Fed. 707), gave it to his typewritist, and had him make sufficient copies of it to make one deposition for each case pending. Several carbons were made to each original, and spaces were left for the names of the various defendants in each action, and these were afterward written.

The effrontery and temerity of counsel in introducing to a Federal Court of Equity such a palpable fraud as these depositions, and expecting to use them as evidence is as serious a breach of professional etiquette and candor, nay, of the duties of an attorney, as it is a failure of evidence.

Time and again throughout the proceedings, the at-

tention of the counsel has been called to these carbon copies and an explanation requested, but none has been forthcoming.

In Appellee's Brief (Mr. Clarke's Statement, p. 5) speaking of our opposition to these depositions at the trial, it is said, "The writer was taken by surprise and " unable to explain." Why could he not explain? Wasn't he there as he purported to be? And why does he not explain now? He simply can't explain. Such proceedings are unexplainable. Why didn't he explain during the oral argument before this Court.

The continuation of one deposition for a number of days after the time set for the taking of it was referred to in our Opening Brief and in the argument; counsel in reply said that this was done because the notice was rather short, and that it was an accommodation to us in order to give us more time; but where was the notice to us of the continuance? We have looked through the records in vain for one; we have never had one through the mails; there was no notice to us at all, and we know that none was given; yet counsel has the audacity to say that this was done as an accommodation to us; as a matter of fact, it was done, if at all, as an accommodation to him; and now that he knows that it was done without any authority of law, he states that it was for our accommodation, and that we can't complain. Such specious arguments are not convincing.

We feel confident that the Court will suppress these depositions, and that the case will fall for lack of any evidence upon the points they purport to cover.

Complainant has no exclusive right to use the word "Hostetter".

We come now to consider the evidence contained in these so called depositions on appellee's exclusive right to use the word "Hostetter" as applied to Bitters. There is no sufficient showing that the Hostetter Co. ever acquired from the estate of David Hostetter, deceased, the exclusive or any right of manufacture of the Bitters. There is an alleged bill of sale by a purported administrator. But there is no showing that this man was an administrator and there is no order confirming sale.

We have not thought it necessary for us to demonstrate to the Court that the laws of Pennsylvania require a confirmation of sale of personal property. If they do not require such a confirmation, it was the duty of opposing counsel to call our attention and the Court's attention to the fact when this point was made in our brief and in the oral argument; the burden was on counsel, and even though this Court might take judicial notice of the law of Pennsylvania to the extent of not requiring it to be pleaded; still, when counsel, familiar with that law, fail to quote it to the Court, the Court must conclude that it is the same as the law of this state. Were this not enough, we could go on to show that there is no testimony in the case to show that Dr. Hostetter ever had the exclusive right of manufacture, that Dr. Hostetter ever died, that his estate was ever probated, that any personal representative was ever appointed, that D. Herbert Hostetter, who signs the agreement of sale, ever was an administrator, or had

any interest in the alleged decedent's personalty (See Tr. pp. 32, 33, 49–52, 67, 68, 76–79, 543–546).

More than this, we are told on pages 32 and 51 of the Transcript, and in the early cases of *Hostetter & Smith* vs. *Adams*, 10 Fed. 838, that Dr. Hostetter never had the exclusive right of manufacture; that he shared it with one M. L. Myers and with Smith. Robb says (Tr. p. 51) that Myers had no monetary interest, and that he acquiesced in the conveyance. Acquiesced? There is no evidence of it. He didn't sign the agreement of sale. And he must have had some rights.

And then Smith, where is he? The same attorney who now appears for complainant thought it necessary to join Smith with Hostetter in the suit of *Hostetter & Smith* vs. *Adams*, 10 Fed. 841. Now he has forgotten all about him. Perhaps, unintentionally, counsel has furnished us with the precise evidence about Smith we require. In the deposition of Crooks (Tr. pp. 43 and 44) we read:

"Q. Under whose proprietorship was the manufac-
" ture of these stomach bitters conducted when you
" first went there?

"A. Hostetter & Smith.

"Q. And Mr. Smith died?

"A. Yes, sir.

"Q. And then Mr. Hostetter?

"A. Yes, sir.

"Q. And the present proprietors are the heirs at law
" of Mr. Hostetter, are they?

"A. As far as I know, yes, sir."

According to this testimony, Hostetter & Smith were

joint proprietors of the right of manufacture. And Smith died.

Worse than the failure to show that Dr. Hostetter ever had an exclusive right of manufacture, complainant shows affirmatively that he never had an exclusive right. Counsel thought it necessary to such succession to the title of one Hostetter after his death, and, upon the trial, when the evidence was shown to be insufficient, got permission to introduce a copy of the bill of sale after the cause had been submitted. Isn't it just as necessary to show what became of Smith's title? and Myers' title?

We earnestly submit that the Court will not tolerate such looseness. Exclusive right to a formula, a label, a trademark must be affirmatively shown and any outstanding title which may appear will defeat recovery.

Where exclusive use is denied, it must be proven.
Ultra Marine Blue Case, 102 Fed. 551, 552.

In *Lorillard* vs. *Peper*, 65 Fed. 597, complainant alleged succession to his predecessor, and when he failed to prove the succession, claimed that it appeared inferentially from the evidence. The Court said:

> "There is no evidence in the record that P. Lorillard & Co. sold, assigned, or transferred their business of manufacturing tobacco or trade-marks to the complainant in this case. If they did, the fact is susceptible of direct and unequivocal proof; and the complainant having failed to furnish it, and relying merely upon incidental and accidental expressions of witnesses, it will be presumed that the fact averred in the bill is not true; and for this reason the bill will be dismissed, at complainant's cost."

On page 260 of *Hopkins on Unfair Trade* it is said:

> "The courts have refused to grant the preliminary injunction where it appeared probable that the plaintiff had never acquired the exclusive right to use the mark, but held it as a tenant in common with another." Citing
>
> *Am. Cereal Co.* vs. *Eli Pettijohn Cereal Co.*, 76 Fed. 372.

In the case cited the Court of Appeals said:

> "It is left doubtful by the evidence whether the father ever parted with his right to such use of that name, and whether the son acquired the exclusive use thereof, and whether they were not both entitled to such use of it as tenants in common, so to speak. The rights being thus clouded with doubt, it was no abuse of discretion to dissolve the injunction."

Only a few days ago, in the case of *Martini* vs. *Sarocca*, Circuit Court No. 12,893, Judge Morrow, of this circuit, dismissed the case on account of complainant's failure affirmatively to show title to a label to which they undoubtedly had title, and it is only, to our minds, because Judge Morrow overlooked this point in deciding this case, that our case failed to go off on the same ground. The fact that this point is not discussed in the opinion corroborates us.

"Hostetter" not susceptible of exclusive appropriation.

But there is another difficulty confronting appellee. It never could acquire the exclusive right to use the words "Hostetter's Bitters" nor any variation of them. The authorities and the argument confirming that point are sufficiently set forth in our Opening Brief, pp. 24, 25, 52–55. The error into which the trial Court fell upon this point arose from considering these words,

"Hostetter's Bitters" as a trade name, not necessarily a valid trademark, but one, which, having been once used, would be protected from unfair use at the hands of a subsequent claimant by injunction denying him any rights at all in the name. There are any number of such cases; they are founded on sound law, and it is strange that the trial Court did not observe the line of demarcation between them and the case at bar. That it did not is evident from the opinion (Tr. pp. 555, 556) and from the decree (Tr. pp. 561, 562), which enjoined all use fair or unfair of the words "Hostetter's Bitters". The case at bar is controlled by such cases as those cited on pp. 24 and 25 of our Opening Brief.

In its Brief (p. 4) appellee makes no attempt to distinguish these cases, and its supercilious dismissal of them is such a palpable evasion of our argument that it is hardly worth commenting upon. The name Singer, as applied to sewing machines, describes a particular style of sewing machine and the Singer cases cited by us hold that any one can make this style of machine and call it by its right name, Singer, provided he represents it to have been made by himself. The Centaur cases hold that anyone can compound and vend Castoria, provided he says it is his own. And the cases of *Hostetter* vs. *Adams*, 10 Fed. 838, and *Hostetter* vs. *Fries*, 17 Fed. 620, long ago decided that the same was true of the word Hostetter.

There was never the slightest hint in our case that these Bitters were of other than local manufacture; there was no deception or holding out at all. Even where there has been unfair competition in the use of

these words, the Court can only enjoin against an unfair, not a fair use. When Dr. David Hostetter gave the Bitters to the public, he was compelled to give it a name, and it is complainant's misfortune, not its protection, that he used his own name. Anyone has the right to make the compound and to sell it, and may apply to it the name by which it was christened. The only restriction is that he must represent it to be made by himself. The appellants had a perfect right to sell "Hostetter's Bitters manufactured by Samuels Brothers", and there is not a case in the law books to the contrary. All that the trial Court, therefore, had jurisdiction to do, if it had that, was to enjoin the defendants from using the words in such a manner as to represent to the public that the Bitters they were selling were the Bitters of the complainant. But the injunction (p. 562) has restrained defendant from using, fairly as well as unfairly, lawfully as well as unlawfully, these words, which everyone is entitled to use. It is an absolute prohibition of the exercise of the plainest possible right.

Holzapfel's Comp. Co. vs. *Rahtjen's American Comp. Co.*, 22 U. S. Sup. Ct. Rep. 6.

We recognize the fact that a defendant in such an action as this comes into Court under a cloud, and that the tendency has been almost to presume him guilty until he is proven innocent. But such a defendant has some rights, and even when the Court becomes satisfied that he has dealt unfairly with the complainant, this will not so blind the judicial eye to his unquestioned rights that all shall be taken away by an omnibus injunction.

A fortiori is this true where a defendant, as in this case, has done no wrong at all, has treated no one unfairly. This point, even though it stood alone, we would confidently rely upon to secure a reversal.

The alcohol in Hostetter's Bitters is disastrous in the very diseases it is advertised to cure.

The directions in complainant's bottles of Bitters read as follows:

" One wine-glassful taken three times a day, before " meals, will be a swift and certain cure for Dyspepsia, " Liver Complaint, and every species of Indigestion— " an unfailing remedy for Intermittent Fever, Fever " and Ague, and all kinds of periodical disorders—a " means of immediate relief in Flux, Colics, and Chol- " eraic maladies—a cure for Costiveness—a mild and " safe invigorant and corroborant for delicate females— " a good, anti-bilious, alterative and tonic preparation " for ordinary family purposes—a powerful recuperant " after the frame has been reduced and attenuated by " sickness—an excellent appetizer as well as a strength- " ener of the digestive forces—a depurative of the blood " and other fluids, desirable alike as a corrective and " mild cathartic, and an agreeable and wholesome stim- " ulant.

" Persons in a debilitated state should commence by " taking small doses and increase with their strength."

We call the Court's attention to the directions in the almanacs, which directions and the advice therein given

are even broader than the statements appearing on the labels.

We proved that the ordinary wineglass contained four ounces or more and to show how dangerous such an amount of Hostetter's Bitters would be to sufferers from the identical diseases it is advertised to cure on account of the large quantity of absolute alcohol the Bitters contains (almost one half) we introduced the most convincing testimony. We had the Bitters analyzed to determine the quantity of alcohol contained and then took the testimony of physicians of the first standing to show that these Bitters, containing this amount of alcohol, taken as prescribed, would be irreparably harmful in the very diseases which the decoction was advertised to cure. A brief summary of this evidence is as follows:

Dr. Falkenau's record showed thirty-four years' experience, during which he had constantly practiced chemistry, and a splendid foundation for his testimony was laid both on direct and cross examination. He testified to having analyzed a bottle of Hostetter's Bitters purchased from Wakelee & Co., druggists, with a view to ascertaining the amount of water, alcohol and fixed residue which it contained; that the result of this examination showed 44% alcohol; and in answer to the question, "How did you determine the presence of that "alcohol?" he testified, "By distilling and measuring "the amount of it and condensing the alcohol under "proper precautions and determining the specific "gravity of the distillate." He also found about 4% of fixed residue; and recognized the presence of vari-

ous flavoring substances, to-wit: sugar and bitters of various kinds.

On cross examination the witness further testified: " We always make several checks to be sure we make " correct tests. We distil several portions and compare " the results to see that they agree."

Mr. Tompkins, of the firm of J. M. Curtis & Son, 123 California street, also testified for the defendant. His experience was eight years, chiefly at the University of California, four and a half years as a professional. His analysis is in evidence as Defendant's Exhibit 3 (Tr. p. 528). This analysis shows 43 per cent of alcohol and 4.44 per cent of dry extract, being almost identical with the analysis of Mr. Falkenau. As the two were made independently, and as the subject of the analysis of such a compound is admittedly difficult, the similarity of results proves the accuracy of each.

Upon the trial Prof. Price was selected by the Court to make a further analysis as a check on the foregoing and on that of appellee's expert Mr. Wuth. Prof. Price's testimony is found in the Tr. pp. 535–541.

He found alcohol by weight 36.56%, by volume 43.56%, thus completely substantiating our experts.

Dr. Berndt, who studied in Berlin, Heidelberg, Leipsic and Breslau, and who is adjunct to the chair of therapeutics of the medical department of the University of California, testified as to the effect of alcohol on the human system. He stated that he had studied the subject of alcohol from the chemical libraries and

closely examined the general literature of people who had made a special study of the subject, that he was the lecturer of the college on the subject of alcohol. A synopsis of his testimony is as follows:

The effect of alcohol on the normal stomach, if kept up for any length of time, results in a chronic inflammation of the mucous membrane of the stomach; or, if taken in large doses, an acute inflammatory process and stimulation and irritant to the mucous membrane. Taken on an empty stomach, it increased the amount of the gastric juices. It is the most powerful stimulant to the secretion of gastric juice we know of. Experiments have been made on dogs, producing a gastric fistula, an artificial opening, and then administering alcohol. Immediately after the administration of alcohol the gastric juice will spurt out of this fistula.

Alcohol is liable to set up a chronic inflammatory process in the liver,—liable to produce what we call cirrhosis of the liver, or contracted liver, a common disease of the liver. It has a distinct tendency to destroy more or less liver cells and produce an increase of the connective tissues wherein the inflammatory process destroys certain cells and connective tissues and contraction will take place.

The effect is very similar on the normal kidneys. It produces fatty degeneration of the kidneys.

On the heart alcohol will first have a stimulating effect and if this stimulation is kept up for any length of time, it is liable to have a depressing effect on the heart, producing more or less muscular weakness, pro-

ducing what we call dilatation or general weakness of the heart. In small doses taken occasionally, it will increase the beating of the heart considerably.

Alcohol is a powerful depressant to the nervous system, if kept up for any length of time, and will also produce these changes in the nervous structure itself, causing chronic inflammatory processes and may destroy normal cells.

A wineglass of liquor 43 per cent of which is absolute alcohol, taken three times a day before meals, contains such a quantity of alcohol as is liable to produce the effects which I have stated on the different organs if this process were continued for quite a length of time. Medicinally when we speak of a wineglass we generally mean a glass containing about four ounces, eight tablespoonfuls. Of course wineglasses are of different sizes. In my house we have different kinds. Medicinally, generally we speak of a wineglass of about four ounces, containing eight tablespoonfuls. I think the ordinary wineglass commonly encountered would cover about the same amount. I have seen a wineglass that would hold a good deal more than this, and may have seen some that would hold less, but we, as physicians, mean a glass that contains about four ounces, eight tablespoonfuls. That is, I think, a rather small glass. If an ordinary person were told to take a wineglass full of liquor daily before his meals, he would probably take about twelve ounces.

Indigestion and dyspepsia in their popular sense are generally caused by over drinking and overeating. By over drinking I mean some stimulants. It might be

an alcoholic stimulant, it might be tea or coffee, some kind of stimulating drink. A wineglassful of liquor, 43 or 44 per cent of which is absolute alcohol, taken three times a day before meals, would be very likely to cause these disorders. If Hostetter's Bitters contains the amount of alcohol as has been stated it is very likely to cause such disorders. Some of the most frequent cases of liver complaint are from over drinking, taking stimulants, and over eating. The same testimony I have given as to the effect of Hostetter's Bitters on indigestion and dyspepsia would apply to liver complaint, kidney troubles, and bladder troubles. I would forbid any alcoholic stimulant for a patient suffering from liver complaint, I would forbid so small a quantity of Hostetter's Bitters as a wineglassful three times a day on an empty stomach. I would make the same injunction against the use of alcohol. In cases of kidney trouble we generally put a patient on a mild diet, absolutely non-stimulating diet. In bladder trouble we forbid stimulants, because they irritate the mucous membrane. We forbid the use of alcohol in rheumatism and in gout. Gout is often produced by heavy alcoholic stimulants. Alcohol is given as one of the causes of gout and given as one of the causes of rheumatism. I do not mean to say that all who have rheumatism get it from alcoholic drinks. Alcohol is very quickly absorbed when taken on an empty stomach. Alcohol produces a burning sensation of the stomach, caused by the irritant properties. I should instruct a patient to avoid it before meals altogether. The effect of Hostetter's Bit-

ters taken before meals would be rather more deleterious on account of the irritating qualities that it has on the mucous membrane of the stomach. The taking of alcohol almost always stimulates a desire for more, any stimulant as a rule, always produces a craving for more. A wineglassful of whisky taken three times a day before meals is liable to produce an appetite for more. The same is true of Hostetter's Bitters. I think it would also be liable to produce an appetite for other alcoholic stimulants. The Doctor testified that such a decoction as was described in the Curtis analysis would be called by him an alcoholic stimulant. If it contains the amount of alcohol suggested it would produce intoxication if taken in sufficient quantities.

" Q. 75. Is it possible to doctor or compound al-
" cohol by a small percentage of chemicals or other
" drugs so as to prevent its effect as an alcoholic stim-
" ulant?

" A. No."

Dr. Golding in rebuttal, in answer to direct interrogatory 28 said: " It is possible to compound alcohol
" by a small percentage of chemicals or other drugs so
" as to prevent its effect as an alcoholic stimulant, for
" example, paregoric, or camphorated tincture of opium.
" That tincture is made with a hydro alcoholic men-
" struum and contains four drams of powdered opium
" per liter. Percentage by volume will correspond with
" four-tenths of the opium, and it is the opium effect
" that you get from the administration of that prepara-
" tion and not the alcoholic effect."

The disingenuous and worthless character of this

testimony is evidenced from the fact that there is no mention of the amount of alcohol, nor the size of the dose. Of course so small a dose may be given that the effect of the alcohol will not be noticeable, but the presence of the drug in the alcohol does not counteract the effect of the alcohol, and if enough alcohol were given the effect would necessarily still be present. We have never heard of an antidote for alcohol.

In tincture of paregoric so much of the drug is present that if enough alcohol were given to get conditions analogous to Hostetter's Bitters, the amount of opium present would kill the patient. Opium is a poison. We certainly admit that it would be possible to put enough poison into a wineglassful of alcohol to kill any man, but this doesn't show that the poison antidotes the alcohol.

Dr. Berndt further testified: In disease, alcohol is unsafe to be taken except on the advice of a physician. Alcohol is a medicine in certain diseases. In all those very depressing diseases and in losing diseases, where the strength of the patient is wasting away, for instance, typhoid fever, we give alcohol. When we need some quick stimulant we use alcohol. We rarely give it except in an atonic condition—in a condition where there is any amount of strength it is contra-indicated. Hostetter's Bitters are not known to the medical profession as a medicine. I think the effect of alcohol is worse on a woman than on a man because of the nervous system of the woman. She has not the power of resistance of the man. She is more apt to lose self control, and loss of self control is superinduced by

alcoholic stimulants.

In "Diseases of Women" by Dr. Geo. E. Herman of the London Hospital, published in 1898, the author says, p. 100, speaking of Chronic Metritis, or Inflammation of the Uterus:

> "Forbid alcohol. So far as it has any effect on the pelvic organs, this effect is to aggravate pelvic congestion. But in patients with weak digestion a little wine with meals may do more good by helping digestion than it does harm by increasing pelvic congestion. But only prescribe it if there is a clear indication for it and prescribe the exact quantity that the patient is to take."

Dr. J. M. Williamson, who held two chairs in the medical department of the University of California, and was President of the Board of Health in this city, also testified for the defendant:

The effect of alcohol on the normal stomach would be first to produce what is known as hyperaemia. That may be defined as an increased flow of the blood to the parts. If you rub the hand it becomes reddened in a few minutes. The circulation from the stomach passes through the liver. Alcohol, when taken into the stomach, goes through the stomach and into the liver. It also produces hyperaemia of the liver, primarily the early stage of the hyperaemia. Cirrhosis is a later condition, and this, if kept up, would result in inflammation. That requires time. That is of chronic character and is accompanied by a shrinkage of the tissues so that the liver becomes hardened, and this condition is known as cirrhosis.

Will you tell us the influence or effect of alcohol on

the kidneys, bladder and heart?

A. On the kidneys; we have primarily the same effect as in the liver only to some lesser degree. The blood carrying the alcohol filtering through the kidneys produces this hyperaemia, which if continued, or rather sufficiently often repeated, will gradually set up an inflammatory condition, a shrinkage of the kidney, and what is known as cirrhosis, or called by some "contracted" or "drunkard's kidney". Cirrhosis of the liver is known as "drunkard's liver", "hob-nail liver", and "gin-drinker's liver".

Q. What is the effect on the normal bladder?

A. Mostly the same effect. Urine carries alcohol with it in order to discharge it from the system, and if there should be a sufficient amount of alcohol in the urine it would cause hyperaemia of the bladder, but not much, because the bladder is a sac containing about from one to two pints of water—the average bladder—we don't need to be particularly accurate of measurements there—the amount of the dilution of the alcohol would be so great that there would be no appreciable effect on the health of the normal bladder.

What is the effect on the normal heart?

A. The effect on the normal heart is stimulating. Alcohol stimulates the nerve centers of the heart; and increases the action of the heart; and there is a rapidity of beat and intensity of beat; the pulse beat becomes more rapid and firm, showing greater impulse behind the blood current.

Q. 19. Any reaction of the heart?

A. As the effect of the alcohol passes off there is a

slowing down till it reaches the normal. If the heart is kept constantly stimulated by the use of alcohol after a while it may become functionally deranged; that is, it would be subject to periodical fits, where it would beat more rapidly than usual and then more slowly than usual.

Q. 20. Would that have any effect on the normal nervous system?

A. You refer now to the action of the heart?

Q. 21. Yes; or this action of the heart caused by alcoholic stimulation.

A. There is usually a certain amount of exhilaration the heart acting more vigorously and the blood current necessarily forced a little further. The circulation is more active in what we call the periphery, the ultimate distribution of the blood current; and on the brain more or less exciting.

Q. 22. Is alcohol quickly absorbed by the human system?

A. Yes.

Q. 23. About how long does it take an empty stomach to absorb a quantity of alcohol, say, an ordinary wineglassful?

A. I cannot give you the exact figures, but would say within a very few minutes because it is noticeable on the breath and also detected in the urine within a a very few minutes.

Q. 24. Within a very few minutes it is distributed all through the system?

A. Yes.

Q. 25. Would food taken within a minute or two after a wineglassful of alcohol have any effect on re-

ducing the condition caused by the alcohol?

A. You mean in modifying the effect of the alcohol upon the stomach or the effect on the absorption?

Q. 26. In both ways?

A. It would depend upon the interval.

Q. 27. Say a couple of minutes?

A. It might to a certain extent interfere with the absorption of the alcohol. For instance, a man will go in and take a drink and then walk over to the lunch counter and eat a cracker. That might get the alcohol mixed up with the food, and it would not be absorbed so quickly.

Q. 28. That would be the only effect, it would not be absorbed by the system so quickly?

A. That is all; would not affect the immediate result on the mucous membrane?

Q. 29. But the mucous membrane would be affected immediately?

A. Yes.

Q. 30. That is, almost instantaneous?

A. Yes.

Q. 31. What is the effect on the human system taking a wineglassful of liquor of which the percentage is about forty-three or forty-four of alcohol, and about fifty per cent water, and four or five per cent dry extract, consisting of invert sugar, cane sugar, a small quantity of ash, a free acid, albuminoids and some wormwood?

A. You want to know the effect of this upon the stomach?

Q. 32. Yes sir; the general physical organism.

A. I would base my answer principally upon know-

ing the amount of alcohol contained. The sugar cuts very little figure here, except that of sweetening. As to the ash the original weight is not mentioned. The free acid is not to be considered, neither the albuminoids or others matters—all in small quantity. The coloring matter is evidently in sufficiently small quantities not to prove a noxious agent. As I said before I would base my answer almost entirely on the fact that it contains alcohol. The effect—that would be the same as that of drinking a glass of whisky or brandy. The average whisky or brandy—bar whisky or brandy—contains from forty-eight to fifty-five or six per cent of alcohol. It would cause hyperaemia; a pouring out of the secretion of the stomach in greater quantities than under ordinary conditions; and no doubt a feeling of exhilaration and increased circulation.

Q. 33. Speaking as you are of the different elements you are referring to the analysis made by J. M. Curtis & Son, are you not?

A. Yes, sir; looking at this paper. (Indicating Defendant's Exhibit No. 3.)

Q. 34. Looking at Exhibit No. 3?

A. Yes, sir.

Q. 35. So that taking that analysis as a basis for the answer is there any difference in the effect on the human system, between taking a wineglassful of the liquor as analyzed and an ordinary wineglassful of whisky or brandy?

A. No, sir; except that this might cater more strongly to the palate. There are some people who dislike the taste of whisky who might prefer this as a medium for taking in alcohol for the reason that cer-

tain volatile principles and flavoring matter, or either, would make it more acceptable to the taste.

Q. 36. What would you say a liquor the component parts of which are shown by the analysis in exhibit No. 3 to be, an alcoholic stimulant?

A. Undoubtedly.

Q. 37. Simply an alcoholic stimulant?

A. Yes.

I would not prescribe alcohol for dyspepsia for the reason that dyspepsia is usually due to a catarrhal condition of the stomach, and alcohol introduced into the stomach would only aggravate the condition already existing.

Q. 44. How would that affect a person with liver complaint?

A. The term "liver complaint" is subject to modification. It is a sort of a blanket. It might include acute or chronic inflammation of the liver—in fact any disordered condition of the liver. I prefer the question qualified to a certain extent. We do not recognize in medicine the term liver complaint.

Q. 45. What I really am attempting to get at is the advertisement of the Hostetter's Celebrated Stomach Bitters, and that that bitters, as shown by the analysis, is given for liver complaint, without designating what particular kind of complaint of the liver?

A. That is a pretty old preparation. I suppose at the time it was produced it may be said that liver complaint may have been an acceptable term. I think I can answer your question. I have already mentioned what its effect is on the healthy liver certainly if it had that effect on a healthy liver, on a congested liver it

would only aggravate it; if in a state of acute inflammatory condition it would irritate it, and in a chronic condition by passing through the blood vessels of the liver, it would make it worse than before. I would consider it absolutely contra-indicated in any diseased condition of the liver with this exception; that if the patient is in a very badly prostrated condition and needed to be kept alive for any definite purpose—for instance, we sometimes have to keep a patient going for weeks on stimulants, simply because the patient himself hates to die or because his friends want to save him—we keep up this stimulation notwithstanding he would die of a diseased liver—we pour it into him a long time, knowing that sooner or later he would come to a finish.

Q. 46. That is, where the case is hopeless, and you are simply delaying the result?

A. Yes.

Q. 52. Would or would not a wineglassfull of liquor containing the amount of alcohol as shown in the analysis, Exhibit 3, with the dry extract there shown, and the balance water, taken three times a day before meals, be a good remedy or cure for dyspepsia?

A. No.

Q. 53. Or liver complaint?

A. No.

Q. 54. Or indigestion?

A. No.

Q. 55. Or rheumatism?

A. No.

Q. 56. Or for gout?

A. Certainly not.

Q. 57. Or for bladder or uterine weakness?

A. No.

Q. 58. For constipation?

A. Might be enough wormwood to cause activity of the bowels; but that amount of alcohol is not advisable for use in cases of constipation.

Q. 59. Would such a quantity of liquor be a serious detriment to the system if taken three times a day before meals in a wineglassful at one dose?

A. In any one of the conditions just enumerated?

Q. 60. Yes.

A. Generally speaking, I say yes. There might be exceptions, though, as noted before—adynamic diseases.

Q. 70. Would a patient be more benefited by the use of the wormwood without alcohol than he would with it?

A. If I were giving a bitters, whether wormwood or quassia or gentian, or any recognized bitters, I would prefer to give it in some other form than alcoholic.

Q. 71. Why?

A. For the reason that unless the indication absolutely demanded I would not care to give my patient alcohol.

Q. 81. Would an article containing forty-three per cent of alcohol, and about fifty per cent of water, and dry extracts as shown in the analysis, Exhibit No. 3, if taken in doses of a wineglassful three times a day before meals have a tendency to create an appetite for larger quantites of such bitters or compound?

A. It depends on the individual. In a majority of cases I would say yes.

Q. 82. Some individuals have a strong will and would not be affected by it?

A. Yes; others absolutely uncontrollable.

Q. 87. Would there be any difference in the system toward increasing the appetite for liquor between taking a drink concocted as herein designated as bitters and taking an ordinary drink of whisky?

A. Yes, I would think so, because it is more palatable. The fact that the bitters is in there increases the flow of saliva and the gastric juice and temporarily creates an appetite. A person addicted to its use would find it necessary to put down three or four ounces of alcohol to pour out the gastric juice and that would make a craving for it instead of for food.

Q. 88. The effect would be more detrimental to the system taking Hostetter's Bitters three times a day before meals than taking whisky?

A. Yes; I think a man would drop his whisky more readily than his bitters.

To contradict this very strong and direct testimony, complainant introduced the testimony of various eastern witnesses whose depositions were taken under *dedimus potestatum* issued by the lower Court, against our objection. There was no showing that complainant could not obtain testimony here and hence no occasion for going outside of this jurisdiction. It was error to allow the introduction of this evidence, and the depositions should be suppressed.

The evidence, however, is of such a weak, intangible nature as to be wholly ineffective against the clear, concise, convincing testimony of our witnesses. We

brought to the attention of the Court men of standing in this community, men whom everyone knew; while the complainant, like one which did not want its ways known, travelled 3000 miles for its testimony and brought that here. The evidence is worse than worthless. Let us examine it.

James Lay has used the Bitters for eighteen years. He is a witness who has testified three or four times, and got $2.50 each time. He seems to have divided this good thing with his friend Finn, another witness; Lay first told Finn to use the Bitters, and Finn has since testified twice.

Marinus has taken the Bitters for eighteen or twenty years. He says, with beneficial results; but it does not appear that he ever got rid of his indigestion.

William T. Fickett took it for a weak stomach and nausea in the morning. We believe that those symptoms arise from over-indulgence in alcoholic stimulants, He seems to believe in a cure by the hair of the dog that bit him. Fickett testified once before.

Reynolds had used the Bitters generally for indigestion for eighteen or twenty years. Evidently if he took it for that length of time it did little good. He is in the employ of the Hostetter Company and has testified in five or six cases of which he can recollect.

Becker testifies to having used the Bitters for ailments of the liver and stomach, also for dysentery. This is the same medicine which is advertised as a cathartic! Becker first heard of the Bitters while he was in the saloon business where he had to get it for

several of his customers, one of whom was a Major Renshaw. Becker received $3 for previous testimony.

Charles Schlich, a Brooklyn barber, says it is good for kidney trouble. The Bitters were prescribed for him by John Malster *who was in the liquor business.* Schlich had previously testified.

Edwards has testified several times and made $10 or $15 out of the appellee.

Ramsey testified twice at $10 a trial.

Allan Russell is an engineer. He has used the Bitters for seven or eight years as a stimulant, after cleaning fires or heavy work in the engine room. He says he does not drink liquor, and probably uses the Bitters instead. Russell has testified three or four different times.

These are the users of the complainant's Bitters and any reading between the lines of the testimony of these stock witnesses will show that they knew nothing of the contents or intrinsic value of the Bitters and simply used it as an alcoholic beverage or stimulant. Their testimony as to the medicinal properties of the Bitters is worthless, in fact, so is all their testimony.

The testimony of the physicians examined by complainant is not more valuable.

Dr. Golding became acquainted with the Bitters while he was a boy. He does not know the composition of the Bitters, and yet deliberately testifies, in answer to direct interrogatory 15, that there is nothing false or misleading in the directions on the label. In answer to interrogatory 16, he states his reasons for his opinion

of the Bitters to be that they have stood the test of time; that they have been in use for a long number of years and continue to hold their prestige, and that they are put up by a reliable firm. Certainly a strange statement from a physician who has no knowledge of the ingredients of the medicine. The ethics of the profession forbid the prescribing of any preparation, the formula of which is not disclosed and all legitimate proprietary articles have the formula on the labels. His testimony that the Bitters would not be deleterious to the person suffering from the disorders named in the label is certainly to be suspected when he does not know the amount of alcohol. He states emphatically that he regards the Bitters as a medicine when he does not know the composition. On crossexamination the answers of the witness do not show that candor which a professional man should exhibit. His answers as to the conditions under which alcohol is contra-indicated do not begin to cover all the conditions. There is a studious avoidance of those connected in any way with the ailments described on the label. The interrogatories directed to the circumstances under which he has prescribed, and those under which he would not prescribe, the Bitters, are not half answered. He testifies that the use of alcoholic stimulants will produce no irregularities, though the abuse will, but what are use and abuse, he does not say. As a crowning exhibition of inconsistency, he says that he would prescribe Hostetter's Bitters for a patient suffering from loss of appetite arising out of the abuse of alcoholic stimulants, and yet this man testified that he had used the Bitters in cases of tuberculosis, pneumonia and typhoid fever, the

very cases where a highly alcoholic stimulant is necessary. He had even prescribed it for rattlesnake poisoning, and yet would give this same stuff to a patient suffering from irregularities brought about by the use of alcoholic stimulants! There is further evidence of Dr. Golding's disingenuous testimony. In answer to direct interrogatory 30, he answered (Tr. p. 482):

"Wormwood is, as we understand it in medicine, a "drug of the pharmacopoeia, the leaves and tops of "artemisia absinthium. It contains volatile oil of "wormwood, bitter principle, and other constituents. "Wormwood is, therefore, a medicine. Absinthe is a "cordial containing a small percentage of volatile oil "of wormwood and various other constituents. It is "not a medicine."

To contradict Dr. Berndt, Dr. Golding testified in answer to direct interrogatory 33 (Tr. pp. 417, 418, 482) that Falkenau's analysis showed a medicine where Dr. Berndt had said it was an alcoholic stimulant. But the analysis is identical with Dr. Golding's definition of absinthe contained in his previous answer, "Absinthe "is a cordial containing a small percentage of volatile "oil of wormwood, and various other constituents. "It is not a medicine." Hostetter's Bitters is a cordial containing a small percentage of volatile oil of wormwood and various other constituents. But Dr. Golding says this *is* a medicine. After this exhibition of inconsistency, we are not amazed to learn that Dr. Golding testified once before and got $25 for it.

Dr. D'Homerque has not been in active practice for years, and was not familiar with Hostetter's Bitters

while in practice. This man is more frank than Dr. Golding. He has never prescribed the bitters for fever and ague or liver complaint, nor for Bright's disease or nervous complaints. He admits that alcohol is contra-indicated in cystitis (inflammation of the bladder) gastritis (inflammation of the stomach) or peritonitis (acute inflammation of one of the abdominal membranes) also inflammation of the bowels, inflammation of the walls of the stomach, and any of those kinds of diseases. He would not prescribe it for inflammatory rheumatism. (It will be noticed that the directions on the bottle make it applicable to many of these diseases.) This physician does not know the ingredients of the Bitters. He testified twice before. This testimony is favorable to defendants and we honor the man who had the courage to tell the truth on cross examination.

Dr. Adolph Wieder is another physician who is willing to prescribe medicine without knowing what he is prescribing. The answers to cross-interrogatories show the same bias noted in Dr. Golding's testimony. He says the places where alcohol is contra-indicated are in "epilepsy, or cerebral hemorrhage where there is a "comatose condition and bounding pulse". But his answers to interrogatories 9, 10, 11, 12, show that the doctor prescribes the Bitters only as Dr. Williamson and Dr. Berndt would prescribe alcohol, in cases of extreme prostration. He has prescribed it in malarial diseases of the tertian form, abscesses of the liver, degeneration of the kidneys, last stage, and Bright's disease (the latter presumably after the case was hopeless).

The doctor admitted, however, having prescribed it for copper snake bite with beneficial results. This is a sufficient admission of its alcoholic nature, and, yet, he further says that he would prescribe Hostetter's Bitters in irregularities brought about by the use of alcohol. Wieder testified once before.

Dr. Ruppel frankly admits that he would prescribe some proprietary medicines, the formula of which is not known, provided they are placed on the market by a reliable concern. Probably he would advertise in the daily papers. The cross-interrogatories show, however, that the prescriptions are fairly in line with the use of alcohol as outlined by defendant's physician. The doctor would prescribe Hostetter's for atonic dyspepsia, malarial diseases, intermittent malarial fever; but has not prescribed it in acute malarial diseases nor in Bright's disease of the kidneys. The doctor testified once before for the company. He, too, would give the Bitters for loss of appetite following alcoholic excesses.

Dr. Pfingsten asserts that a dose of Hostetter's Bitters should be a two ounce wine glassful. He admits, however, that a Rhine wine glass contains 2½ times as much, and that sherry wine glasses are recognized in the profession, and that he is also familiar with Rhine wine glasses and champagne glasses The doctor asserts that alcohol is contra-indicated in some diseases of the nervous system, and in some diseases of the stomach; also in some diseases of the intestines, like typhlitis, peri typhlitis and in acute Bright's disease, thus substantiating our witnesses and contradicting some of the other witnesses of appellee. One would

think, in the face of this, that he did not know the quantity of alcohol it contained, and yet, he admits that he gives Hostetter's Bitters with quinine, and would give it to a patient suffering with alcoholic excesses in preference to any other preparation.

To read the evidence of these physicians is to be convinced that "they are not their own, they are bought "with a price". We cannot imagine that a reputable physician would stultify himself and prostitute his profession by prescribing a remedy of whose ingredients he knows nothing and prescribe it where alcohol is contra-indicated, when the compound is one-half alcohol. There is nothing in such testimony to shake the forceful vigor of the evidence of our own witnesses.

It must be constantly borne in mind that none of these physicians who testified for appellee knew the quantity of alcohol in these Bitters, hence did not know what they were talking about. Appellee carefully kept this from the witnesses, claiming that our analysis was "pushed up" to show greater alcoholic strength and asserting there was less than we showed. So there is actually no evidence going to contradict our evidence of the pernicious effect of the great volume of alcohol in these Bitters upon the very diseases they are advertised to cure. The Bitters are a poison in the guise of a panacea. The argument that these Bitters are not an alcoholic stimulant, commencing on page 6 of Appellee's Brief, is forceless. It is based on the evidence of physicians and others who do not know the composition of the Bitters, nor their amount of alcohol. Of what value is such guess-work? But in the face of the un-

controverted evidence that the Bitters are 43% absolute alcohol, even the pertinacity of counsel could not continue forever, and on page 27 of the Brief we find: "The intoxicating qualities of alcohol are overcome, if "not wholly, at any rate partially, by the presence of "other drugs." So it is finally admitted that the pernicious effect of the alcohol is only partially overcome. The proof, however, shows it is not overcome at all, and cannot be. The experience of the witness Robbins (Tr. pp. 357–362), and the experience of every one who ever drank these strongly alcoholic Bitters, is conclusive.

Is any argument necessary to show that such a medicine (?) advertised to cure diseases on which the effect of alcohol is disastrous, is a fraud on the public? Imagine a man with indigestion or dyspepsia brought about by an inflamed condition of the stomach, a man suffering from a disordered digestion brought about by the excessive use of alcohol, a man the victim of kidney, liver or bladder trouble, or a woman, under any circumstances, being told to take a wineglassful of whisky three times a day before meals, four times the usual drink of whisky! Yet Hostetter's Bitters are worse than whiskey for they contain as much alcohol, but in a cruder, rawer, more virulent state, absolute spirits. If appellee wanted to be frank and fair and to produce direct evidence, why did it not ask its physicians what would be the effect of this amount of alcohol on the diseases it advertises its Bitters to cure instead of asking them whether Hostetter's Bitters would be harmful and at the same time concealing the quantity of alcohol in

the Bitters? It did'nt dare. It simply evaded the issue. If alcohol was good for those diseases, if Hostetter's Bitters were good, why did complainant contend that a wineglass contained only two fluid ounces instead of the well known four?

But let me return to Appellee's Brief. On page 12, we read:

" It is respectfully submitted that, in order to exclude " the appellee herein from protection against the fraud- " ulent acts of the appellant, it must be clearly shown " that the appellee is guilty of fraudulent conduct to- " ward the public; that it must be a fact known to the " appellee as false, material to the public, and that the " appellee has no reasonable ground to believe the " statements made to be true, and no reasonable ex- " cuse for the statements."

It is admitted, then, that a complainant whose conduct is that last quoted is not entitled to equitable relief. Is not this precisely the conduct of this complainant?

But appellee continues:

" In this case the appellant seems to confine its " proofs to these statements: That appellee's Stomach " Bitters are an article intended to deceive the public; " that the partaking of them is injurious to the public " health; that their representations upon the labels, " with advice or directions thereon given to persons " suffering from numerous ailments, are false, and " known by appellee to be false."

What further proof is necessary? Do not the proofs described in the latter quotation exactly fulfill the con-

dition described in the former? It seems to us that the appellee has admitted itself out of Court.

The Best Evidence.

We assert again: If appellee's Bitters are medicinal and it wants to prove that fact, it must produce the best evidence, the formula. Counsel assert that this contention is not made in good faith, that it is offered only in the hope of obtaining the formula to be used in appellant's business. Such puerile evasions of the question are ridiculous. What does the appellant want with the formula? It is already known to all drug dealers and liquor men. In one case, appellee's two spies, during the hearing before the examiner, were confronted with samples, and could not tell that of the appellee from that of the defendant, although they pretended to be experts. Appellant sold these Bitters as an alcoholic beverage, did not claim it as a medicine, and yet even an expert cannot tell the Bitters it sold from those sold by appellee. In every case the spies swore the two articles were similar in color, taste and smell. Moreover, neither appellant nor any of the defendants in the other cases made any special point of selling Bitters. They were not even a staple article of sale. Under all these circumstances, how could appellant be commercially advantaged by obtaining the formula? The argument of appellee is preposterous. If there is any medical virtue in the compound, let its makers disclose it. They won't reveal the formula, because they know the revelation would show that they are vending a mere alcoholic beverage, and no medicine, and the "hope of their gain" would be gone. Every

reputable formula is disclosed—witness that of alka lithia, to which the Court's attention was called during the argument.

Chief sale of Hostetter's Bitters is as alcoholic beverage.

This brings us to the main purpose of this suit. It is common knowledge that Hostetter's Bitters are found on every bar, that they are sold constantly as alcoholic liquor, that the bulk of the business of appellee is done through liquor houses, and not through drug stores. If the highly virtuous appellee is engaged wholly in the humanitarian occupation of ameliorating the sufferings of mankind by vending a valuable medicine, why does it object to the appellant in this action selling its own Bitters as a beverage? What harm could come to it from the competition of liquor men? Do men go to a liquor store for medicine? Why didn't these spies go to a drug store? Because appellee is in the liquor business. Because it is liquor business it is after. We asked the witness Morrison (Tr. p. 142):

"Q. 49. How did you come to visit the store of the " defendants on the 30th day of March, 1899?" and the answer was "I knew it was a wholesale liquor house".

It was liquor men's competition they were endeavoring to suppress. And in the face of this, appellee has the effrontery to try to make this Court believe that it is not vending an alcoholic stimulant, that it is not perpetrating a fraud on the public. It even tells its victims to take less than the prescribed doses at first, gradually increase it, the very way alcoholic drinks are taken. It knows a teetotaler couldn't stand so much alcohol at first. It knows the result would disclose its

chief ingredient. It knows how to fasten its tentacles gradually on its victim.

By claiming that this is a medicinal compound, appellee is escaping the liquor tax imposed by the Internal Revenue Laws of the United States, and the local taxes.

Hostetter vs. *Adams*, 10 Fed. 841.

Is it any wonder that appellee fights hard to keep us from proving that it is vending an alcoholic stimulant, defrauding the people and even the United States government?

On the inside page of the front cover of the Hostetter Almanac for 1901 is the following:

" The public should also beware of the local bitters " attractively labelled and sold as 'appetizers' and " 'stomachics'. The injury inflicted upon the stomach " by these drams in disguise is irreparable. They are " composed of cheap and fiery spirits, with some bitter " extract infused for flavoring, and in consequence of " the low price at which they are sold, enjoy the patron- " age of impecunious imbibers."

"Impecunious imbibers"! Could plainer words be chosen to show the commercialism of the present crusade of the Hostetter Company? Could there be more convincing evidence that it is itself in the liquor business, and endeavoring to keep others out? Is not the analysis of Hostetter's Bitters we have produced the exact counterpart of the Bitters above characterized as "appetizers" and "stomachics"? Is not a liquor composed of 44% alcohol, water, and some 4%

bitters and flavoring extracts exactly one "composed of " cheap and fiery spirits, with some bitter extract in- " fused for flavoring"?

Complainant makes much ado about the great length of time its Bitters have been before the public, the number of times it has been protected and the novelty of this defense. But because it has grown gray in iniquity is no reason the iniquity shall continue. The novelty of this defense is not material. It may be new to this complainant, but it is old in equity. Because no litigant ever used it in a Hostetter case before is no drawback to its efficacy now. We are not responsible for the laches of others. We used the defense at the first possible opportunity and purpose establishing it. According to appellee's argument, the United States Government had no right to abolish slavery, having tolerated it for years. The argument is on a par with the Bitters it is meant to defend.

There was some contention that the public ought to know that the Bitters were alcoholic, because the word "Bitters" was notice of that fact. This is no consolation for appellee, even if true, for the amount of alcohol is not stated, and no sane man would expect to find medicine as strong in alcohol as a drink of whisky, or a whisky cocktail. But "Bitters" is not medicinally indicative of alcohol. On page 338 of the Transcript, Dr. Williamson is recorded as saying, "If I were giving a bitters, " whether wormwood or quassia or gentian, or any " other recognized bitters, I would prefer to give it in " some other form than alcohol." This is the only evidence on the subject, and it is all our way. There are

all sorts of bitters, and this talk about the necessity for an alcoholic menstruum is all nonsense. The only necessity for alcohol is to enable the appellee to sell intoxicating liquors as medicine to defraud the public, and the Government, and to make money by misrepresentation.

While speaking of alcohol in the Bitters, we may as well animadvert to the efforts of counsel to make it appear less than it really was (why did they try this if alcohol was not injurious in the diseases the Bitters were advertised to cure?). The amount of alcohol by volume as shown by the analyses of Falkenau, Curtis and Prof. Price is between 43% and 44%. Dr. Golding tried to make this amount appear to be less, and succeeded in making it apparent that he was trying to deceive the Court. Otto Wuth, for the complainant, testified to 35%. The Curtis analysis contains the following: "Alcohol *by volume* (including volatile oil or "worm-wood) 43.110%." This analysis is defendant's Exhibit 3 and a copy of it was submitted to Dr. Golding with complainant's interrogatories. Dr. Golding, however, is the only man to whom an exact copy was submitted. In interrogatory .17, addressed to Dr. D'Homerque, and in interrogatory 11 submitted to Otto Wuth only a garbled synopsis is submitted, the first line of which is "consists of 43.110% of pure alcohol". In the interrogatory a quotation mark preceded these words, and the whole professes to be an exact copy of the analysis. The words "by volume" were purposely eliminated. An examination of the Wuth analysis tells why. It says, "Alcohol 35%", and in answer to

interrogatory 10 Wuth says, "The determination made " by me of the alcohol in these Bitters is absolutely cor- " rect, and is 35% not 43%". Mr. Wuth's analysis has been deceitfully caused to show 35% without showing whether by weight or by volume. Undoubtedly it was by weight, as that corresponds practically with Prof. Price's analysis by weight. The report by Wuth of his analysis is dated Sept. 22, 1900, and the analysis itself was undoubtedly made previously. The application for a commission was made October 1st, 1900, and the interrogatories were handed up September 29th. The Wuth analysis was made, then, before the interrogatories were submitted, and, doubtless, before they were prepared, for Mr. Clarke says in his affidavit made September 17th, filed with the petition for a commission, "That the " delay in submitting the interrogatories has been " caused by the inability of affiant to converse with " some of the witnesses as to be able to formulate the " interrogatories or to know to what a witness could " testify in rebuttal." Mr. Clarke knew, then, before preparing the interrogatories, the discrepancy between the Wuth and Curtis analyses, and the reason therefor, yet he wilfully omitted to make this known to Dr. Golding, sought evidence from him to show that the amount of alcohol had been "pushed up" when he knew it had not been, concealed from Dr. D'Homerque and Mr. Wuth that the alcohol in the Curtis analysis was "by volume" and, in the Circuit Court, charged that the Bitters analyzed by Curtis and Falkenau had been tampered with by pouring out one-half of the quantity and refilling the bottle with alcohol.

Now, then, we have the explanation of the garbled analysis submitted to Dr. D'Homerque and Mr. Wuth. Nothing is said to them about volume, and Mr. Wuth received his instructions to determine the amount of alcohol by weight. Appellee took care that it should not appear that the amount was determined by weight, and it was not apparent to Mr. Wuth that our analyses had been "by volume" because those words had been eliminated. The complete analysis was submitted to Dr. Golding, the first of the witnesses examined, as a mark of good faith, and it was not likely that thereafter the garbled analysis would be particularly noticed. The appellee then brings this evidence to the Court, and submits the Wuth analysis as having been obtained under circumstances analogous to our analyses, but exhibiting a striking discrepancy, and it remained for Professor Price's testimony to throw a flood of light on the mystery. The conclusion that this evidence was manipulated for the purpose of deceiving the Court is irresistible. In the light of this inexplicable conduct in connection with these analyses, it certainly seems that the conduct of counsel should be closely scrutinized, and if there is one such flagrant attempt to impose upon the Court, it is not improbable that there are others. Good will towards counsel gives way to suspicion, and where a doubt should have been resolved in his favor it must now be taken against him. It is fair to presume that these twelve or more depositions, all of which are in *haec verba*, although one was taken a month after the others, and most of which were taken the same day and the same hour, were no depositions at all, but simply copies of previous depositions taken

some time before, or even not taken at all—simply manufactured for the occasion. They bear intrinsic evidence of manufacture. Counsel who was present at their taking does not offer to explain all this, and where he has shown himself equal to deceiving the Court in one respect, he must take the consequences in others. It will, therefore, be further presumed that the inferior evidence as to the Hostetter Company's succession to the rights of David Hostetter was introduced because better evidence would have been adverse, or because there was no sufficient evidence.

All these matters were brought to the attention of counsel in the Circuit Court. The man who took the deposition was present, and made no effort, no attempt, to explain why they were carbon copies one of another, made no attempt because there was no possible explanation. We charged him with fraud in attempting to mislead the Court as to the quantity of alcohol in the Bitters and he was silent. As Cicero said to Cataline we might say to him, "*Quid Taces*?". Still he would not reply, and for the same reason. He knows his guilt. The criminal audacity, the utter recklessness of appellee and its counsel, is startling. It positively shocks the moral sense. That a Federal Court of equity can be wilfully imposed upon and no attempt made at explanation is incomprehensible. We have always been taught that our Federal Courts were the great bulwarks of American institutions, that they were worthy of all admiration and respect, but it seems that the commercialism of the age spares not even our best and dearest, that it

invades the sacred precincts of our most cherished institutions and destroys the ideals of our profession, and tries to drag the practice of the law to the meanest bargain-counter.

Equity will not protect a quack medicine.

We took this up in our Opening Brief, cited a uniform line of authorities which asserted the doctrine and were met in Appellee's Brief by what? Not a denial of the doctrine, but a denial that appellee's Bitters was a quack medicine. Either it is a quack medicine or no medicine at all. Perhaps it is both. A quack medicine, according to all the authorities cited in our Brief (p. 26) is one the formula for which is not disclosed. Can words be plainer? Is the Hostetter formula disclosed? No. Is not Hostetter Bitters, then, a quack medicine? To establish the contrary appellee cites no authorities (Brief p. 5), but introduces the evidence of various doctors, whose testimony has already been commented upon. The "quackness" of this article is a question of law, not of opinion, and the opinions of men who do not know the composition of the article cannot carry any force.

Why should equity protect that about which it knows nothing? Why should a man be allowed to say I want you to protect this article, but I won't tell you what it is? There are quacks, charlatans and impostors enough without the assistance of equity.

The Federal Courts hold a power which is mighty for good in the dealing with iniquity. They may work wonders in suppressing fraud, preventing the practice

of medicine without a license, stopping the exploiting of human life, putting an end to endless imposture and villainy. We have confidence that the Federal Courts are alive to this, and that they will assert themselves to the great gratitude of a long-suffering public.

In Mr. Clarke's counter-statement he said, speaking of the failure of the defendants, in the other cases, to appeal, "All save Samuel *seemed* contented." Contented! They did not appeal, because of the small amount of money involved, and the large expense of appealing, because appellee had not the courtesy to stipulate that the other cases should abide the appeal in one, or that only one transcript need be filed. But all resented appellee's hollow victory, and all applauded the appeal which was to secure a vindication of the defendants and the exposure of the iniquity of appellee's insidious article. As the solicitor for one non-appealing defendant said, "I am glad to see that the defendant " in one of these actions has the nerve, the independence " and the public spirit to fight this matter out to the " last. I am glad it is not going to give up simply " because there is not much money involved and it " does not care whether they sell the bitters or not. " All the defendants are with them in spirit. I am " glad that it is not going supinely to let a wealthy " corporation call reputable business men frauds and " impostors where the frauds, cheats and impostors are " all in the complainant's own Company. I feel con- " fident that you will win out, and you may command " my assistance in every possible way. This is an " opportunity for doing the whole United States a

" lasting and valuable service. The iniquity of the " patent medicine fraud is a National curse. Some " quack puts up a compound and advertises it broad- " cast. The unsophisticated read the advertisements, " dwell on them, and begin to imagine themselves af- " flicted with the premonitory symptoms of the various " distressing diseases so artfully described. Let " the mind become doubtful, and the health of the body " is instantly affected. Then the quack reaps his har- " vest. Imagine a compound 44% of which is crude al- " cohol, the rest of the liquid water, and about 4% of " the commonest drugs and flavorings, being called a " medicine, and being sold for $1.00 a bottle! It is " preposterous. It is villainous. It is liquid poison. It " is slow murder."

We cannot endorse these strong words too heartily. Read the ingenuity with which the Hostetter Almanac is written up, note the number of diseases described and described in an insidious way to make the readers think they are being smitten. Then look at the deposition of John B. Crooks (Tr. p. 42) and bear in mind that during the last 27 years from nine to twelve million copies annually, in nine different languages, beside a flood of newspaper advertisements (Tr. pp. 594–597), have been strewed all over the country. And what has been the harvest? To the credulous readers, disappointment, wrecked health, poison, misery, drunkenness. Crook's testimony on the magnitude of appellee's advertising was introduced by appellee, in boasting of its strength, its stability, its activity. Boasting? Yes, but of what? Of its shame, of its power for evil,

of its capacity for villainy, of its opportunity for deception, of its facility for fraud. Can a complainant boast of its shame in a Court of Equity? Can the Federal jurisdiction be invoked to assist such diablery? Shall poison be given to our women and children in the guise of medicine? Shall they be taught to imbibe alcohol in its strongest and most virulent shape, right in their own homes? Shall the foundation be laid for drunkenness and misery where health and vigor is sought? Shall the man who is not strong enough to take alcohol in moderation and must abjure it or fall, be cast into the gutter because he took an apparently innocent dose of what purported to be medicine?

Is this appellee, with its record of wrecked homes, shattered lives, deaths and skeletons, deserving of any equitable consideration? If it wants to go into the liquor business, let it come out into the open, let it sell as others sell and let its product be admittedly alcoholic. The defendants are not temperance men. They are not preaching prohibition. It is their business to sell liquor. But they believe in selling it only to men who can drink liquor and still be men. They are openly and honestly in the liquor business. Buyers of their goods know them to contain alcohol. They do not set a trap for their fellow-men. They do not obtain money under false pretenses. They are not wolves in sheep's clothing. They are not snakes in the grass. They are not exploiting human life. When told their goods contain alcohol, they do not cower like whipped dogs, neither do they claim falsely that the quantity of alcohol has been "pushed up". When they come into

Court they put up a square fight, and do not try to deceive the Court, by producing "fixed" testimony as to the quantity of alcohol in their goods, neither do they claim their goods to be medicinal, and then refuse to disclose their contents.

May it please the Court, We have discussed this case at great length. We have spoken and written in some heat. But we think the importance of this matter justifies us throughout. We have done our duty to our client, and our duty to the public. We feel that it has been a privilege to present this matter to this Court. We think that we shall have had a small hand in checking one of the greatest evils in the country. We envy this Court its opportunity. It is not often that so large an opportunity to do good and to check evil is presented. A decision for appellant will work a world of good throughout this land, and will stand as a precedent which will make quacks hesitate before they "put their money into a bag with holes".

We feel certain that this Court would give an opinion in our favor on the facts, which do not show unfair competition; on complainant's failure to show exclusive right to the word "Hostetter" either from Dr. Hostetter or from Smith, or that any one ever had the exclusive right; also on the injunction which denies us the use of the word "Hostetter" even with proper distinguishing marks. But while we rely upon all these points, it is the public question involved which appeals to our manhood. It is upon this point that we expect the burden of the Court's decision to be placed. We have spared no pains to present it as strongly as

possible, in the hope of benefiting a long suffering and much abused public. We are confident of the co-operation of the Court in this work of righteousness.

We take great pleasure in acknowledging the most valuable assistance of Mr. William M. Gardiner of the San Francisco Bar in the preparation of this brief.

Respectfully submitted,

R. H. COUNTRYMAN,
Solicitor for Appellant.

No. 788.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUEL BROS. & COMPANY, (a corporation),
APPELLANT,
vs.
THE HOSTETTER COMPANY, (a corporation),
APPELLEE.

APPELLEE'S BRIEF.

E. EDGAR GALBRETH,
Solicitor and of Counsel for Appellee.

DEMOSS BOWERS, Law Printer, 175 N. Spring St., Los Angeles.

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APPELLEE'S BRIEF.

In the "Statement of the Case," in Appellant's Brief, counsel for appellant falls into error in making the statement that "No attempt was made to prove any registered trade-mark," (bottom of page 2 of Brief), as Mr. R. S. Robb, the secretary and treasurer for many years of The Hostetter Company, testified that the

labels (A. & B.) had been registered and re-registered in the patent office as trade-marks, (Record, pages 70 and 79); also, in the further statement made that "The appellant denied the corporate existence of appellee, (Brief, p. 3), as appellant states in its answer (paragraph 1) that it "cannot admit or deny the allegations of said bill relative thereto contained in the first paragraph of said bill;" * * * also in stating therein (Brief page 8) that, "It is evident from the depositions themselves that the witnesses did not appear and give their testimony, and that the certificates of the notary public that the witnesses appeared before him is not true." There are changes and differences between the depositions both in words and punctuations; as an instance, in the depositions of R. S. Robb, on page 33, the following:

"Q. Are we to understand you that that right was exclusive?

"A. Namely, D. Herbert Hostetter," is entirely wanting in his subsequent deposition, given on page 68.

Also,

"Q. And he acquiesced in this conveyance?

"A. Yes, he was merely a nominal partner." (Bottom of page 77 and 51); and there are others.

Appellant intermingles with its "Statement of the Case," much that might be termed argument, if entitled to any designation, which appellee does not admit to be properly any part of the "Statement of the Case," or to be true in fact; such as that the

testimony of appellee's witnesses was more than met by the testimony of appellant's witnesses; or, that the distinguished Circuit Judge overlooked the testimony of defendant's witnesses (Brief p. 13); or, that appellee hired two spies (Brief p. 12); or, that appellant only disposed of seventy dollars worth of bitters a year (Brief p. 14); and such like arguments and conclusions of appellant's counsel in the "Statement of the Case."

APPELLEE'S POINTS AND AUTHORITIES.

I.

The omission of the answer herein to make a specific denial, as to appellee being duly incorporated, may be taken as tending to prove the allegations of the bill of complaint, relative to that matter; "Certainly any proof that establishes the fact should be sufficient."

Hanchett v. Blair, 100 Fed. Rep. 821;
Dutilh v. Coursault, 8 Fed. Cas. 4206;
Brown v. Pierce, 7 Wall. 205.

II.

Appellee has exclusive right to make Hostetter's Bitters and call them by that name. All of the cases cited by appellant to sustain a contrary doctrine, are either not applicable on account of difference of facts, or have been overruled; at least by implication.

III.

Appellee is not required to produce secret formula, but would be protected by injunction against being compelled to do so.

Champlin v. Stoddart, 30 Hun. 300-302;
Jarvis v. Peck, 10 Paige, 118;
2 Story's Eq. Jur., Sec. 952.

IV.

The Hostetter Stomach Bitters is not a quack medicine, nor beneath the dignity of any court to protect. For more than fifty years the preparation has been made and compounded by the members of the Hostetter family, in a uniform manner, and, as shown by the testimony of physicians of long experience and practice in their profession and thoroughly competent to give correct testimony relating thereto, did so testify, that said bitters had been frequently prescribed by them for the ailments mentioned in the label ("A."), with beneficial results; also, it is the testimony of others that they have received benefits from the use of the bitters. See testimony of

Dr. Louis C. D'Homergue, p. 492, et seq;
Dr. John F. Golding, p. 473 et seq;
Dr. Adolph Wieder, p. 498, et seq;
Dr. Gustave Pfingsten, p. 506, et seq;
Dr. Frederick E. Ruppel, p. 502, et seq;
Charles Schlich, p. 518;
William T. Fickett, p. 513;
Allan Russell, p. 524;
Augustus H. Marinus, p. 526;
Robert J. Reynolds, p. 514;
Major Richard P. Merle, p. 436;
James H. Lay, p. 512;
William J. Finn, p. 491.

Against the testimony of such persons having knowledge of what they testify to, appellant would

have this Court accept from persons testimony founded on acknowledged ignorance of the merits of the curative qualities of the bitters, giving no experience of results from the use of them, (except an overdose, or rather frequent doses at intervals of 15 minutes each); merely guess work.

Courts will not willingly allow the well and honestly earned valuable business and good will of a company like that of Hostetter's to be destroyed by infringement of their rights and unfair trade.

Collinsplatt et. al. vs. Finlayson et. al., 88 Fed. 693.

Hilson Co. vs. Foster, 80 Fed. Rep., 897,

Where the court, for Coxe J. says: "There should be no officious meddling by the court with the petty details of trade, but, on the other hand, its process should be promptly used to prevent an honest business from being destroyed or invaded by dishonest means."

V.

Appellee's bitters are not an alcoholic stimulant, nor contra-indicated in the diseases for which they are prescribed, nor are they a fraud on the public, but are a benefit.

Dr. Louis D'Homergue, a physician who has practiced medicine and surgery for many years, says that he has used Hostetter's Stomach Bitters as a general tonic with beneficial results, and, in proper doses—in such doses as, for instance, as are mentioned on label "A," for all the ailments mentioned on the said label,

it would be beneficial, (pp. 421), and, that a wine glass, contains 2 ozs. (not 4 ozs.), (pp. 422, 494).

Dr. Adolph Wieder, a physician of 12 years practice, in Brooklyn, N. Y., testified, that he had frequently prescribed Hostetter's Stomach Bitters with beneficial results, and that he had used it for himself and family with very beneficial results, and, that he had never heard any complaints of its being injurious or having bad effects, and, it could be prescribed with beneficial results in all the ailments set forth on the label. (pp. 424, 498, 499).

The decision in Celluloid Manufacturing Company v. Sellonite Manufacturing Company, 32 Fed. Rep., 94, it is stated that "It is the object of the law relating to trade-marks to prevent one man from unfairly stealing away another's business and good will. Fair competition in the business is legitimate and promotes the public good, but an unfair appropriation of another's business by using his name or trademark, or by imitation calculated to deceive the public, *or in any other way,* is justly punishable by damages and will be enjoined by a court of equity."

This idea seems to be followed further in the case of Enoch Morgan's Sons v. Wendover, 43 Fed. Rep., 420, wherein the court says: "The language 'unfair appropriation of another's business in any way' would include the substitution of 'Pride of the Kitchen' for 'Sapolio' (soap), when the latter was demanded. Anything done to induce the belief that the one article is in fact the other, is unfair, and, indeed, unlawful."

In Coates v. Holbrook, 2 Sand., Ch. R., 586, it is stated that "No person has the right to use the name of another."

The decisions so far as the *name* is concerned are so many that it would be useless to cite them. However, if the name Hostetter cannot be protected in this proceeding, then the good will of appellee's business is worthless, because its good will consists in the name under which the bitters are compounded and sold—the abbreviations thereof, as testified to by many witnesses, simply meaning the same thing.

In Gage-Downs vs. Fletcherbone, 83 Fed. Rep., 214, the court says: "The underlying principle in such cases is that a man cannot make use of a reputation which another manufacturer has acquired in a trade-mark or *name*, and by inducing the public to act upon a misapprehension as to the source of the origin, deprive the party of the good will and reputation which he has acquired and to which he is entitled."

In the opinion in Hostetter vs. Brueggerman et al., 46 Fed. Rep., 188, Judge Thayer says: "One counseling a fraud and furnishing the means of consummating the same is himself a wrongdoer, and as such is liable for the injury inflicted."

This decision is emphasized in Hostetter vs. Becker, 73 Fed. Rep., 297, and Hostetter vs. Somers, 84 Ibid, 333, the facts connected with the transactions being quite analogous to those in the case at bar. Hostetter's Bitters were sold and delivered in jugs

or demijohns, although not billed as Hostetter's Bitters, yet the suggestion was made that they should be sold at retail from the Hostetter bottles that had once been used to contain the genuine bitters—upon demand for Hostetter's Bitters; the defendants contributing the means for the perpetration of a fraud on the public by furnishing the empty bottles for the bulk bitters, sold on demand for Hostetter's Bitters. It will be observed that in the case at bar the appellant furnished the empty bottles, thus laying itself liable to a criminal prosecution under the laws of California. Penal Code, sec. 354.

For a definition of a *trade name,* counsel respectfully refers to the case of Fairbanks vs. Lockle, 102 Fed. Rep., 327, being a recent decision, where it is stated as follows: "That a trade name differs from a trade-mark, inasmuch as it appeals to the ear more than to the eye." So that, even although it is not claimed or pretended that the appellee's witnesses were deceived when they asked for Hostetter's Bitters and had the imitation delivered to them in bulk, yet may not others have been deceived by making like purchases on demand for Hostetter's Bitters, the name being so well known and so popular? Quite innocently might such retailer make such purchases and refill the bottles, under the impression that the appellee—the Hostetter Company—sold the bitters not only in bottles, but also in bulk, or by the barrel, as stated in the case of the South White Lead Com-

pany vs. Cary, 25 Fed. Rep., 125, wherein the court makes use of the following language: "The defendants sell their goods to retail dealers, and it may be that such dealers are not deceived, but they sell to customers who are or may be deceived, and the complainant is entitled to relief," etc.

In Avery vs. Meikle 81 Ky., 75, where appellants were successful plow makers, upon which they placed their trade-mark, and defendants made plows in imitation thereof, but did not imitate the *trade-mark*, still an injunction and other relief was allowed; appellees laid aside their own letters, trade-mark and numerals used to indicate the sign, &c., of this plow and sold cheaper than appellant. In the case at bar it will be noted that appellant does not pretend to use its *own name*or other indication of ownership, but prefers that of appellee.

Protection does not entirely depend upon an individual's invaded rights, but upon the broad principles of protecting the public from deceit.

Messete vs. Flannagan, 2 Abb., Pr. R. N. S., 459.

No person has the right to use the *name* of another. Coates vs. Holbrook, 2 Sand., Ch. R., 586.

"The courts will arrest at any course of the proceedings, although good faith is pleaded."

Coleman vs. Crump, 70 N. Y., 573.

If appellant is diverting appellee's trade by any practice designed to mislead its customers, whether these acts consist in simulating its labels, or *repre-*

senting in any way * * * its products as those of appellee's the latter is entitled to protection.

Anheuser-Busch Brewing Association vs. Piza, 24 F. R. 149.

The name of a firm is a very important part of the good-will of the business carried on by the firm. The question of a trade-mark is in fact the same question.

Churton vs. Douglas, 7 W. R., 365, (Eng.)

Chief Justice Fuller in Lawrence Manufacturing Co. vs. Manufacturing Co., 138 U. S., 537, said:

"Undoubtedly an *unfair and fraudulent* competition against the business of the plaintiff, conducted with the *intent* on the part of the defendant, to avail itself of the reputation of plaintiff, to palm off its goods as plaintiffs', would, in a case, constitute ground for relief."

And see Clark Thread Co. vs. Armitage, 67 F. R., 896.

Where the dominating character of a trade-mark *is a name by which the manufacturer's goods have become familiarly known to the public, another manufacturer has no right to designate his goods by that name, even though he accompanies it with a different device.*

It was decided in Curtiss vs. Bryan, 36 supra, 33, "that a mere false or exaggerated statement in a public advertisement will not deprive a complainant of protection in a court of equity, upon the ground

that the public is being deceived, or induce the imposition of a court of equity in its behalf.''

And the same rule applied in the case of Centaur Co. vs. Robinson, 91 Fed. Rep., 889, that is to say, that a false statement on a label did not deprive the complainant of relief, the label saying that the medicine sold consisted entirely of vegetable substances, and, upon analysis made and proved, it was shown that two mineral substances, to wit, bicarbonate of soda and rochelle salts, entered into the compound.

It is respectfully submitted that, in order to exclude the appellee herein from protection against the fraudulent acts of the appellant, it must be clearly shown that the appellee is guilty of fraudulent conduct toward the public; that it must be a fact known to the appellee as false, material to the public, and that the appellee has no reasonable ground to believe the statements made to be true, and no reasonable excuse for the statements. In this case the appellant seems to confine its proofs to these statements: That appellee's Stomach Bitters are an article intended to deceive the public; that the partaking of them is injurious to the public health; that their representations upon the labels, with advice or directions thereon given to persons suffering from numerous ailments, are false, and known by appellee to be false.

ARGUMENT.

That the appellee is the owner of the business, good will and property of its predecessor in interest relating to the business of compounding and selling of the medicinal preparation known as Hostetter's Stomach Bitters, was abundantly proven by the testimony of Mr. R. S. Robb, (pages 67 and 68,) and by "Complainant's Exhibit 'Assignment,' Introduced at Hearing." (Pages 543 to 546.)

Appellee corporation is composed of the sons and daughters of the predecessor in interest of the business (p. 67), and it has been decided in many cases that the appellee, The Hostetter Company, acquired from its ancessor, the original inventor and discoverer of the same, the formula under which it has been, for nearly a half century, in the manufacture of what is known as Hostetter's Stomach Bitters.

Hostetter Co. v. Wm. Schneider Wholesale Wine & Liquor Co., 107 Fed. Rep. 705;

Hostetter Co. v. Conron, 111 Fed, Rep. 737, and cases cited.

Hostetter et al. v. Adams, 10 Fed. Rep. 838.

The corporate existence of appellee was shown by the testimony of R. S. Robb (pages 76 and 78); also, by certified copy of "Charter" or Articles of Incorporation (pp. 547 to 552), and as such corporate existence was not specifically denied in the answer, any

evidence of the fact of the incorporation of appellee should be sufficient to establish that fact.

Hanchett v. Blair, 100 Fed. Rep. 817.

The depositions taken in Pittsburgh should not be suppressed. The taking of these depositions was neither unfair nor improper. It is true that by inadvertence the first depositions referred to appear to have been taken the 9th day of October, 1899, instead of October 13, 1899, as noticed, and it was not discovered until too late to prevent the same from being filed, but as soon as the mistake was discovered appellant's counsel was notified, in reasonable time, that other depositions of the witnesses would be taken in Pittsburgh, December 7, 1899. Every endeavor was made, facility provided and courtesy extended to counsel to have them present, on behalf of the appellant at the time and place of taking the depositions; and for a supposed accommodation to counsel, and that they might have further opportunity of being present the taking of the depositions was adjourned for eleven days, to-wit, until December 18, 1899.

The court will take judicial knowledge of the fact that the witnesses in Pittsburgh live at a greater distance from the place of trial than one hundred miles.

Mutual Ben. Life Ins. Co. v. Robinson, 58 Fed. Rep. 723.

The depositions under U. S. R. S. Sec. 863 may be taken before any notary public not being counsel

or attorney to either of the parties, nor interested in the event of the cause.

Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, which notice shall state the name of the witness and the time and place of the taking of his deposition. Sec. 864 provides that every person so deposing shall be cautioned and sworn to testify the whole truth, all of which conditions were fulfilled, and the utmost good faith was observed toward the appellant in the matter of the taking of the depositions.

Also, see Equity Rule 68.

There is much evidence to support the charge of fraud and unfair dealing in the Bill of Complaint. The testimony of W. R. Morrison and J. W. McEvers, convincingly shows the following fact: That when they entered appellant's liquor store in San Francisco on March 30, 1899, they were met by Mr. Paul Samuel and after some conversation he was asked by Mr. Morrison if he had Hostetter's Bitters? He answered, "Yes," and being asked the price he replied "$8.50 per case." Thereupon Mr. McEvers said, "That is pretty high priced; there is not much in it to the retailer at $8.50 a case." Whereupon Mr. Samuel went into the office and shortly returned and said to Morrison and McEvers: "You fellows ought to buy Hostetter's Bitters in bulk; that is the cheapest way." Mr. McEvers asked him "if the bit-

ters in bulk were just the same as the other bitters." Samuel replied: "They are just the same, there is no difference in the bitters at all," and further said that he sold the bitters in bulk at $2.25 a gallon and that would make about eight bottles. He then *volunteered the statement* that he would tell them something, as they were new in the business, and that was that appellant would not handle Hostetter's Bitters if they could not get and sell them in bulk to their customers. Of course the Hostetter's Company *only sells* to importers, in bulk, for if they sold to all the small places they could not sell their case goods. (Pages, 109, 110, 181, 182.)

This elegant gentleman, "refined in manner and demeanor," generous and well educated (Appellant's Brief pp. 51, 1,) seeing before him two common men, and a doubtless good future trade from them, jumped at the chance to duly impress them with his ability to do business and give them the counsel and advice how they were to make the most out of the bulk bitters, by getting enough bitters for $2.25 to make nearly "eight bottles"—such as he furnished—empty Hostetter Bitters bottles, having thereon the two labels or trade-marks of appellee. Mr. Morrison then said he would take "a half gallon of Hostetter's Bitters" and Samuel directed an employee to fill up a half gallon of Hostetter's Bitters, which was done.

So, "choice of words, refined in manner and demeanor." And this gentleman as an instance of his generosity and business acumen, then further advised

the purchaser that he "*could get a bottle of Hostetter's Bitters, and then fill that up whenever it gets empty*," (page 180,) whereupon Mr. Morrison asked if he could get a Hostetter bottle at a drug store "handy," and this well informed salesman said to him, "you cannot get an empty Hostetter bottle at the drug store. *The junk shop is the place to get that*, (he was well posted) * * * but wait a moment," and then obtained and delivered to Morrison an empty Hostetter Bitters bottle, with the labels and trade-marks of appellee thereon; (pp. 112, 113, 180, 181).

Counsel asked Samuel—when a witness—this question, which was answered, (p. 233): "Q. 15. If these witnesses said that you told them to fill up the Hostetter's Bitters bottle with your H. Bitters and to palm them off on the public, is that true or false?"

"A. They don't tell the truth."

Now, whether that is ingenious or ingenuous, the question was not fairly stated, for the reason that neither Mr. Morrison nor Mr. McEvers, said that Mr. Samuel used the words "and palm them off on the public," nor was it necessary for him to say to fill the bottle with "H. Bitters," when the conversation, taken in connection with the circumstances of what was then, and just previously had, there occurred—the conversation about bulk bitters, the amount of bottles a gallon of bitters would fill, the

cheapness of the "nearly eight bottles" compared with $8.50 for twelve bottles of the case goods,— will leave no doubt in the mind of this honorable court, that the advice and intention of Samuel was that the empty bottles which he delivered to the purchasers should be filled up with the "H. Bitters and palmed off on the public."

On the second visit to appellant's place of business, on April 6, 1899, (pp. 126, 127, 191.) Mr. Morrison and Mr. McEvers were met by the same salesman, Mr. Samuel, who had waited on them on their previous visit, when Mr. Morrison said to him, "I want to get some more tokay wine, and $1.25 *worth* of Hostetter's Bitters, and a half gallon of sherry wine." Thereupon Mr. Samuel directed a man to "get the wines, and a half gallon of Hostetter's Bitters out of the barrel marked H. Bitters," and the order was soon filled and the demijohn containing the bitters was tagged, on one of appellant's regular printed tags or cards, which read: "Samuel Brothers & Company, wholesale wine and liquor dealers, 132-134 First Street, San Francisco. H. Bitters" (p. 128).

Mr. Morrison and Mr. McEvers are both plain but honest men, of veracity and good character, against neither of whom is there any reason shown why this honorable court should not believe they told the truth, the whole truth and nothing but the truth; every circumstance and the admitted or undisputed

conditions and environments of the transactions, sustain their testimony; the fact that they, on the same day on which conversations occurred, made notes and wrote reports of all such conversations, while the impressions were fresh, and especially as their attention was closely fixed upon and their memories charged with, what was said and done in their hearing and presence, so that they might be able the more accurately and minutely to detail the same in such reports, would far better fit them to more fully and truthfully state in their testimony just what was said and done at the times of their visits to appellant's place of business, than would be Mr. Samuel, who took no notes of what occurred, and who testified to matters which occurred more than a year afterwards, be he ever so much more polished in manners and generous in habits than they. They were in no wise spies, but were seeking to ascertain whether appellant was selling a stomach bitters as and for Hostetter's Bitters, which were in fact not Hostetter's Bitters, and the proper, and practically the only way to learn that fact was the course they pursued, viz., to inquire; and it was a matter of the utmost indifference to them whether appellant was so doing, for no possible contingency could arise, in either event, by which they would be profited, as they received the same pay for services rendered, in any event, (p. 213). There existed no incentive for them, or either of them to tell anything but the exact truth, and they did that in their testimony.

Appellant in his brief (pp. 27 to 34) has cited as authorities and quoted from persons who have, it may be presumed, enlightened the world upon the baleful effects of intemperance in the use, or abuse of alcohol. Should it not be sufficient answer for appellee to say that not even one of these distinguished (?) authors was produced as a witness; nor were any of their publications offered in evidence, or even referred to in the trial of the case. At what time or date the "New York Public Opinion," became authority to be cited in a court of Justice rests with appellant's counsel to give information; as to "Carpenter on Mesmerism and Hypnotism," appellee pleads ignorance and the work is not to be found in the law library. On page 32 of said brief, it is stated the "Hostetter formula is well known and is to be found in druggists' books." If such be the case why is appellant so exceedingly anxious that appellee should be compelled to divulge it. The proposition is ridiculous, upon its face.

In the case of Von Mum v. Frash, 56 Fed. Rep. at page 387, the court says: "It is further to be observed, that although in the case decided by the New York Court of Appeals, (Fisher v. Blank, 33 N. E. Rep. 1040) there was no testimony from witnesses that in the trade the defendant's manufacture had been taken for the other, the danger of such mistake was held sufficient to call for the interference of the Court. See also Braham vs. Beachim, 7 Ch. Div. 856. That case therefore overthrows

the objection taken here that there is no evidence of any instance where a person has been defrauded by the method adopted by the defendants in dressing up their manufacture. It is not likely that the knave who perpetrates the fraud upon the ultimate consumer will disclose himself to the complainants; and the ultimate consumer, if cognizant of the fraud practiced upon him, could not, unless by mere accident, be known to the defendants."

In the case of Hilson Co. v. Foster, 80 Fed. Rep. 896, the court says: "Money invested in advertising is as much a part of the business as if invested in buildings or machinery, and when the goods of a manufacturer have become popular, not only because of their intrinsic worth, but also by reason of the ingenious, attractive and persistent manner in which they have been advertised, the goodwill thus created is entitled to protection against unfair competition."

(U. S. C. C., N. Y. 1897.)

It was said by the Judge who delivered the opinion in the case of the Hostetter Company against the Wm. Schneider Wholesale Wine and Liquor Company, 107 Fed. Rep. 705:

"I think this case presents a clear case of unfair competition in trade and the doctrine rests squarely upon the proposition that men must be honest in their business transactions, and rely upon the merits of their own goods, and not to undertake to palm off inferior goods as and for goods of the genuine manufacturer, such as this case shows."

By what evidence does the appellant expect to be relieved or to succeed in ruining and destroying the business of the appellee? Evidently the testimony of Louis Falkenau should be excluded entirely, for the simple reason set forth in his answer to cross-question 48, p. 264, when asked what the liquid in the bottle claimed to be, by the defendants, a bottle of Hostetter's Bitters, he says: "The liquid that is now in this bottle, is alcohol, water, sugar and a number of other substances *which I have not been called upon to determine.*" It is most clearly in evidence that an extract of the character here in dispute, may contain many medicinal qualities, held in solution, which would constitute its real value; and this witness being produced as an analytical chemist to determine what they are, has not, according to his own admission, so determined—in fact, he denies being called upon to determine what they were. Then the answer to the next question is, that he was called upon to examine the material as to "alcohol (and a general idea as to the residue, not a full examination of the residue, only an idea of what it was that was in it.)" This, it must be admitted, was an unfair test of the contents of the bottle, whether it contained genuine Hostetter's Bitters or the bogus bitters made by one of the defendants. It being so vague and uncertain, appellee's counsel claim it should not be included in the consideration of this case; or, at any rate, it should not be considered as having any weight in determining whether or not

Hostetter's Stomach Bitters are what is claimed for them by appellee, namely, a medicinal preparation, and so far as this term is concerned, it may be noted that it is not shown that Hostetter's Bitters have ever been advertised, recommended or used for aught else than as a medicine, or what is termed a medicinal preparation. This gentleman, Falkenau, who claims to be a chemist, does not even know what constitutes a wine glass, as he says in answer to re-direct question No. 91: "I believe about two or three ounces; *I don't know.*"

Mr. Tompkins, who works for Curtis & Son as an analytical chemist, is the next expert witness who purchased from Mack & Co. a bottle of bitters. It seems that this sample of bitters was open to anybody about the establishment who wished to have access to it. He says (page 276): "The typewriter and two men connected with the wine-gauging department." That was after the analysis; before the analysis three members of the firm, including the witness, had access to it. This bottle was analyzed by the witness and Marvin Curtis, in conjunction, *yet Curtis is not produced as a witness*, nor Mack. It is marked exhibit No. 2, and when introduced and offered, Mr. Galbreth, for the appellee, asked for only a one-ounce vial of the contents of the bottles, which was refused. He then asked for a ½-oz. vial and this was refused also. This uncalled for action on the part of the appellant's counsel, should certainly cause the court to look upon the exhibit, and the claimed analysis of it,

with suspicion. This sample of bitters, so imperfectly identified as being of complainant's manufacture or compounding, is the substance from which Exhibit No. 3, claimed to be the analysis thereof, was taken. The witness says that Exhibit No. 3 is a correct analysis of the contents of Ex. No. 2, so far "as we are capable of analyzing it." Yet he does not even assume to testify to the ability of his colleague to make an analysis, or his qualification as an analytical chemist. The leading feature of this analysis or one of them, and one that seems to be dwelt upon by the defendant, is that it contained a baleful substance known as wormwood or absinthe. Since we have shown by Mr. Robb, who is conversant with the compounding of Hostetter's Bitters to a certain extent, that wormwood does not enter into such a compound at all, and by the testimony of the noted analytical chemist, Otto Wuth, that he found no wormwood at all, and from the fact that it is shown that Hostetter's Bitters have always been made or compounded in the same way, having the same ingredients, the conclusion must be and the only reasonable one is, that the defendant obtained some of the bogus bitters with which the market in San Francisco appears to be flooded, for the purpose of making this pretended analysis. Believing that wormwood or absinthe is a very injurious drug, causing all manner of trouble and all manner of derangements of the human system they lay great stress upon this point, that complainant's bitters containing wormwood are not entitled

to any protection in a court of equity. Then, the next point seems to be to make it appear to contain a much larger percentage of alcohol than it really does. This being such a simple test, it is another reason for believing that defendants have not analyzed Hostetter's Bitters at all; or, if they have, it was a sample that has been "doctored" and the percentage of alcohol increased by adding thereto more cologne spirits, a very simple and tempting process. Defendant's counsel fails to make this witness say that the analysis was made on a certain day, because he says he has forgotten (p. 52). Witness did not even prepare or make "Exhibit 3." He says (p. 50) that it was prepared by John Curtis & Son, not called to identify the paper or to corroborate the witness. He answers this question on page 33, "The next item, alcohol by volume, including volatile oil of wormwood 43.110 per cent., did you examine that yourself?" Answer. "I don't remember whether I made that particular part of it or not." Then follows and is spread upon the record a copy of this so-called analysis. The witness is asked this question (page 55) by defendant's counsel: "You brought the bottle here yourself, didn't you?" (Somewhat leading.) Answer. "Yes, sir; in person." Question. "Always was in your possession?" (Rather leading.) Answer. "Yes, sir, from the time it left the laboratory." Then, if we turn to this witnesses' testimony, we find on page

275-6 that this bottle was, he says, in the possession of the firm, and after the analysis it was accessible to anybody who could enter the laboratory; it was on the shelf and the janitor of the building had access to it, and anybody he would allow to come into the building; besides there was the typewriter and two men connected with the wine gauging department. This is only referred to to show the vague and uncertain manner in which the appellant seeks to bolster up its side of the case. The next resort is to Peart, a lawyer's clerk for Mr. Tilden, who brings with him one of the Hostetter almanacs, and it is offered in evidence. Mr. Galbreth's motion (276) to strike out all the evidence given by Mr. Tompkins on the ground of its incompetency, should prevail. Having produced this vague and imperfect analysis of bitters, obtained not from the laboratory of the complainant, nor from its agent, in San Francisco, but from some other person unknown to the complainant, who is not produced, the defendants make said analysis the foundation for hypothetical questions, and the physicians whose testimony hereinbefore has been referred to or examined thereon. Granting that they give as their *opinion* that the bitters compounded after a formula as shown by Exhibit No. 3, would, in their opinion, be injurious in many cases, or for argument's sake, we will say in all cases, still this is only a matter of *opinion* and it is not shown by any of the witnesses that any one has

been injured by partaking of this compound or one similar to it; nor is it shown by any one of their witnesses that the article so favorably known as Hostetter's Bitters, and so long a leading article in the drug trade in the United States and other countries, sold everywhere, has been injurious to even a single person who has taken them as *directed by the prescription* (or even otherwise), which is *plainly to be seen on the label upon every bottle.* They seem to take the position that because one of the substances contained in Hostetter's Bitters, to-wit: alcohol, which is the acknowledged menstrum for all substances of the sort and for the making of all tinctures, it might be in the crude state injurious, and that one of the doctors had heard of a case where alcohol was administered to a dog and the result was disastrous, in some way; still they seem to go no further, and defendant's witnesses, the professional gentlemen, reluctantly, perhaps, yet still do admit that alcohol is a medicine, that it reduces the temperature if administered frequently in fever. But then Hostetter's Bitters is a different substance, and the difference between alcohol and substances compounded by its use, is fully explained by Dr. Golding in his testimony, and must be apparent to every one. The intoxicating qualities of alcohol are overcome, if not wholly, at any rate partially, by the presence of other drugs. The great desire on the part of the defendants appears to be, as evidenced by their cross interrogatories, to get

the complainant to develop a trade secret. They have not applied to the court for an order to compel the complainant to make known this trade secret, and thus ruin their business by giving these people the secret formula for making the bitters, because, probably, they know that such order would not be granted.

The most injurious effect they are able to show that Hostetter's Stomach Bitters had produced, was by experimenting upon a member of the bar of San Francisco, who drank of the bitters so freely, and so frequently, without regard to the directions upon the label, that he was thrown into the arms of Morpheus, and given a headache, as he says. Further than that there was no complaint, and this seems to be the extent of the injurious effects of Hostetter's Bitters.

The appellants' Point No. 5 (p. 25) is manifestly absurd.

It was held in Tongen vs. Ward, 21 L. T. N. S., 480, that a defendant, under analagous statements of fact as in case at bar, was *bound to know* what *representations* his clerks made and was liable therefor. The facts in the Gorman case are not at all similar to those in this case. Who is Paul Samuel, (p. 231) appellant's star witness? And who Marks D. Levy? (223.)

Appellee is entitled to that protection which this court is able to give, and under the numerous decisions covering the field of "unfair competition in

trade," some of which decisions are above cited, we most respectfully submit that the appeal, should be dismissed and the decree of the Circuit Court affirmed.

E. EDGAR GALBRETH,
Solicitor and of Counsel for Appellee.

IN THE

United States Circuit Court of Appeals,

NINTH CIRCUIT

No. 788, In Equity.

SAMUEL BROS., & CO., Appellants,

vs.

THE HOSTETTER CO., Appellee.

Mr. Clarke's Statement for Appellee.

ALBERT H. CLARKE,
Solicitor and of Counsel for Appellees.

SMITH BROS., FRANKLIN PRINT, 405 GRANT ST., PITTSBURGH, PA.

IN THE

United States Circuit Court of Appeals,

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No. 788, In Equity.

SAMUEL BROS., & CO., Appellants.

vs.

THE HOSTETTER CO., Appellee.

Mr. Clarke's Counter Statement.

To the Honorable, the Judges of said Court:

The above case was tried before Judge Morrow, one year ago, and his *opinion* (pp. 553–4 of Record) handed down in July, 1901,—eight cases, including appellants, were, by agreement, tried as one. Several other suits, instituted by the Hostetter Co., were heard at the same time, and all not settled by compromise, were also argued, submitted and decided in due time. All save Samuel *seemed* contented, and injunctions duly issued. They now sell the genuine article of bitters, presumably. At any rate, appellees' sales have increased, and the public have an assurance that the article demanded may be obtained.

Samuel was discontented, and has filed a "round robin," of only twenty-seven errors committed by Judge Morrow. Many of these "errors" charged are fallacious, and without the foundation of proofs adduced. They travel in a circle; go outside the record and end where they begin, by the plaint that the case went against appellant.

If the findings of fact, by the Court below, are not deemed by this Court conclusive, then the present presentation of the case amounts to a rehearing, or new trial.

As to the Transactions.

Messrs. Evers and Morrison, witnesses for appellee, testify to having made two calls at appellant's store (pp. 109, 179) at different dates, that on demand for Hostetters Bitters, were sold by Samuel, bitters by the gallon, (the genuine is never sold in that manner.) and furnished with empty genuine bottles. This would seem to be sufficient evidence, if believed. We have the witness' statements, besides the exhibits, the articles furnished, and Morrison (p. 110) relates a queer story, quite reasonable though, about the Hostetter Company selling bitters in bulk, to enable Samuel and a few other favored ones to reap a rich harvest. Samuel and Levy deny all appellees witnesses say, and yet there was but one of them present at the time the purchases were made; Samuel says, (p. 232): "I told them that the bitters were better than Hostetters Bitters. They were a bitters better than Hostetter's Bitters, and *naturally I tried to sell my own goods.*" Then on page 233, he says in answer to his counsel, question 12, (to which said question the Court's attention is respectfully called, as it is a fair sample of many others), "*No, sir;* they asked me for a bottle, and I gave them a bottle." Thus, from appellant's own mouth has he proved himself guilty of "unfair dealing." But little stress was made at the argument of this case in the Court below, upon the question of fact relating to the transactions, but the main defense was that Hostetters Bitters were a most unwarrantable fraud upon the public, and defendants, all of them, eight in number, and this was sought to be proved by strictly *soi disant* expert testimony, with the exception of the introduction of "a terrible example" in the shape of a lawyer, who partook of the bitters no less than five excessive doses, and yet the only evil (?) effect produced appears to have been that "it made him sleepy." Bad for a lawyer; he should be wide awake at all times. (*Vide*, Testimony of L. M. Robbins, Esq., 360).

It may safely be stated this is the only testimony offered on the part of appellants to prove the so-claimed dire and baleful effects of Hostetter's Bitters. All the balance is of the expert kind, yet none of it, on behalf of appellants, questions the character of the genuine Hostetter's Bitters; but instead a "concoction" (to use a term "concocted" by appellants' learned counsel) for the occasion, taken from a bottle which Mr. Countryman said contained the genuine bitters, yet positively refused to allow even a half ounce to be taken therefrom and given Mr. Galbaith for the purpose of examination and comparison; so that it may well be claimed the liquid was not Hostetter's Bitters. Quite likely it was a bottle of Samuel's "better than Hostetter's."

The question calling for opinions of appellants' expert witnesses seem to have been based upon the effect of *alcohol* taken in unreasonable doses, and they were quite unanimous in declaring their opinions as physicians. *Not one had used or prescribed Hostetter's Bitters.*

The Court below, in its opinion, seems to have paid little heed to expert testimony.

Not much testimony of this class, strictly speaking, was offered by appellees; yet at the same time testimony of persons well qualified, and who know whereof they speak, is entitled to reasonable consideration, including witnesses' *opinions:* at least being called as experts does not *disqualify* them as witnesses regarding facts.

Let us examine whether said witnesses, called by appellee, were so called "expert," in *all* they said.

Dr. John F. Golding, (p. 473 *et seq.*) presents all the qualifications necessary for him to testify as an expert. He goes further. He says, "*I have prescribed said bitters,* (Hostetter's) *with beneficial results.*" He explains that a *menstruum* is required in all such preparations. He tells that a wine glass contains just two fluid ounces, as established by the U. S. Pharmacopœia of 1890. He says there is nothing false or misleading (p. 477) in the directions on

the label and the bitters can be safely and beneficially used for any and all of the said complaints, by persons who are afflicted therewith." This last must be "opinion," yet on the same page he says. "I have used it with beneficial effects for many of the ailments that are on said label set forth, *and know* that it has been of value and beneficial to patients thus afflicted."

Dr. Golding stands high in the profession. He could not and he would not give his aid to any unworthy cause. The depositions of this physician and four others were taken upon *interrogatories*, in New York, and they have used and still use Hostetter's bitters. *None of them are personally acquainted with any member of the Hostetter Company, Dr. J. M. Williamson*, (for appellants) says, "We ought to be consulted whenever anybody has to take a dose of medecine."

Major Morle, clerk of the U. S. Circuit Court at Brooklyn, must use Hostetters bitters no more in his family. If his wife is improving, after taking them, he does not know it, as a fact, because a Dr. Williamson was not consulted.

(*Vide* Assignment of Error, No. 28.)

However, the Court below has based its opinion upon the fact of the endorsement by the *public* with its seal of approval and of its *commercial value.* The appellee's business is what the appellants are after. They claim Hostetter's Bitters are entirely unfit to be sold, are dangerous and worthless; yet still are they most anxious to obtain the right to use the name, the bottles, trade marks, and above all the *formula.* Yes, "they all cry for the *formula.*"

Athough in the case at bar the answer alleges the formula to be well known, yet not a particle of testimony was introduced in support of the allegation.

If the appellant is making bitters of its own, why does it not appear it advertises them, registers a trade mark, and thus compete with appellee in business? One would suppose that with a certain class it would reap a rich harvest.

Yes, if it had the Hostetters' business, the formula, coupled with the commercial integrity and ability of the Hostetters, it could get along quite well, undoubtedly.

Several of the assignments of error make plaint regarding the *abreviations* of the name Hostetters' Bitters. I am not surprised, since it would like to be able to use said words and letters. How easy for the wholesale man to say to his customer, "No, I have no Hostetters' Bitters, but I have some fine 'H' Bitters," accompanied by an intelligent wink.

The "round robin" sort of "errors" committed by Judge Morrow I will not attempt to dwell upon except as an entirety, and not having as yet received a copy of appellant's brief, can only anticipate the same, in part.

Much stress is laid upon the fact that Judge Morrow allowed appellee to file certified copies of the trade-mark and articles of incorporation, at the time of the argument. Is not full authority for so doing given Circuit Courts, under Act of Congress? *Vide* Revised Statutes, Sec. 918.

Then, at the argument, it was claimed there were irregularities in the depositions taken at Pittsburgh. The writer was taken by suprise and unable to explain. No notice of motion to strike out the depositions was given. However, was it not rather late to complain or make objections, when none had been raised at the time of taking? No one appeared for defendants, and had no notice at all been given, still we had the right to take proofs, and they had the right to cross-examine afterwards, under Rule 68, Equity Practice. Rev. Stat. Sec. 866.

I regret Mr. Countryman was unable to go to Pittsburgh to cross-examine and interlard the record with his most remarkable "objections," seventy-three of which he spread upon the record containing testimony of Mr. Morrison—21 pages—at least one-half of the space being used for such objections. Pretty hard on my good natured colleague, who seldom either cross-examined or objected, thus

giving appellant full swing for leading questions and their answers.

Has the Court Below Decided the Case Erroneously?

The proofs are all in favor of appellee. That Samuel Bros. & Co. were guilty of the acts charged, is surely well established by the proofs. They are of that class ever living and thriving upon the brain and industry of others. "They toil not, neither do they spin", or perform other manual labor. A neighboring merchant who discovers, or placed upon the market an article that becomes desirable and profitable is at once pirated upon by the Samuels, the Martinonis, Levys *et al.* It was full time the Hostetter Company sought to protect itself. If even the depositions of Robb. Carson, McCullough and Crooks be suppressed there is sufficient evidence yet remaining to prove title to the trade-mark and the plant at Pittsburgh to be in appellees, the certificate of corporation, the conveyance of the goods, which was offered and allowed. Besides, it is really asserted by appellants in their answer that the business originated with Dr. J. Hostetter, the grandfather of the present owners.

It would seem strange indeed if this Court should see fit to undo and annul any of the most equitable proceedings in the Court below.

To grant the prayer of the appellant would be to ruin the business which has been most honorably and faithfully conducted for fifty years, by appellee and its predecessors, paying large sums of money annually to the Government, and employing a large number of persons. Appellant was challenged to produce the single instance of a person damaged or injured by partaking of the stomach bitters, and has failed. The "errors" assigned are quite technical. Great latitude is observed in allowing such testimony to be introduced as will tend to the Court's enlightenment and is in conformity with justice and equity.

It would hardly seem necessary to cite authorities in support of the repeated assertion of the Courts all over the world, that "one man cannot sell his goods as those of another."

Appellees goods have been pirated upon all over the country, and even in South America, and in Australia.

(1st Victoria Reports p. 7.)

In *Hostetter vs. Becker*, 73 F R., 297, Judge Coxe makes use of the following language:

"Admitting that nothing was said upon the occasions when these bottles were given away with the demijohn, I think the inference is most conclusive that it was the intention of the defendant or his agents that the demijohn should be poured into the bottles and sold in that way. No other presumption, in my view, can arise from that conjunction of facts. Therefore, to draw an analogy from the patent law, it is a case of contributory infringement. Of course the buyers of defendant's bitters were not deceived. It is not pretented that they were. And that is not the theory of the Bill, as I understand it. *But the defendant placed in the hands of buyers implements to enable them to deceive the general public.* It cannot be successfully disputed that it would be a fraud upon the complainant's rights if a retail dealer should fill an old Hostetter's bottle with spurious bitters and sell it to retail purchasers as the genuine Hostetter's Bitters; and yet this is, in the eye of the law, precisely what the defendant does. While not doing that himself he enables others to do it, and he suggests to them the way in which it can be done successfully. * * * That is the law which has been enunciated ever since the doctrine of unfair competition in trade has found a place in the law books."

The burden of proof, in the Court below, was upon respondents to show that the bitters made by the complainant were *injurious*. In this they signally failed. Not a single instance of deleterious effects was shown. Not an

iota of testimony was adduced. They seemed to have taken it for granted it was a bad thing, or not so good and pure as the "H" Bitters they sold.

Since appellant was unable to show that appellee's bitters had ever injured a single person during the time—above 40 years—it had been constantly upon the market, and kept among the family medicines of thousands of people, and since it utterly failed to show the least act of fraud or misrepresentation on the part of appellee, and since appellee has adduced positive proof of the beneficial results following the taking of this medicinal preparation, the public at large having received it with marked favor—then how can it be expected this Court will reverse the Court below.

It will not surely destroy what might equitably be termed the "vested rights" of appellee.

A slight irregularity in practice is not enough, as it did not in the least redound to the damage or injury of the appellant.

Respectfully submitted,

ALBERT H. CLARKE,

Solicitor and of Counsel for Appellee.

March, 1902.

No. 788.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUEL BROS. & COMPANY, (a corporation),

APPELLANT,

vs.

THE HOSTETTER COMPANY, (a corporation),

APPELLEE.

APPELLEE'S REPLY BRIEF.

E. EDGAR GALBRETH,
ALBERT H. CLARKE,
Solicitors and of Counsel for Appellee.

DEMOSS BOWERS, Law Printer, 175 N. Spring St., Los Angeles.

IN THE

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THE HOSTETTER COMPANY, (a corporation),	APPELLEE.

APPELLEE'S REPLY BRIEF.

In reply to "Appellant's Supplemental Brief," a copy of which was received by appellee's counsel at Los Angeles, on March 28th, 1902, this brief is filed, by permission of the Court obtained at the time of the argument of this cause.

"The more we consider this case, the more firmly are we convinced that the appellant is *not* entitled to a reversal"

There is but little of *reply* to Appellee's Brief in Appellant's Supplemental Brief, but very much rehashing, revamping and restatement of "Appellant's Brief."

As to Evidence of Fraud.

The evidence of the appellee was *not* meager on any of the issues involved, but was full, fair, convincing and preponderating of fraud on the part of the appellant.

It will be remembered that the evidence by which fraud was shown was adduced by two unimpeached witnesses, Mr. J. W. McEvers and Mr. W. R. Morrison, and was strongly corroborated by many and strong circumstances, which could not be contradicted or denied by appellant, among which may be mentioned the following:

It is undisputed that appellee's witnesses called twice at appellant's place of business and inquired for "Hostetter's Bitters," and made purchases, each time, of ½ gallon of Stomach Bitters, each, of which were put, by the salesman of the appellant, into half gallon demijohns and tagged by him on a regular shipping tag of appellant, as follows: (On the first demijohn the tag read as follows:)

"Samuel Bros. & Company Wholesale Wine & Liquor Dealers, 132-134 First St., San Francisco. ½ gal. H. Bitters." (Tr. p. 112.) On the second

demijohn, (purchased April 6, 1899,) the tag read as follows:

"Samuel Brothers & Company, Wholesale Wine & Liquor Dealers, 132-134 First street, San Francisco. H. Bitters." (Tr. p. 128.)

The bills or invoices covering said purchases were written on the bill heads of appellant and were in the following words:

"San Francisco, Mar. 30, 1899, sold to L. H. Hatch.

½ gal. H. Bitters	2.25	1.12
1 " Tokay		1.50
2 D. Johns		.45
		3.07

Paid, per Samuel Bros. & Co." (Tr. p. 588.)

(Second bill or invoice)

"San Francisco, April 6, 1899.

Sold to Cash:

½ gal. Sherry	.90	.45
½ Tokay	1.50	.75
½ Bitters	2.25	1.15
Dem		.65
		3.00

Paid: Samuel Bros. & Co." (Tr. p. 589.)

There is no denial that the appellant furnished the two empty Hostetter's Bitters bottles at the time of, and in connection with, the sale of the Stomach Bitters in bulk; and this, after appellant's salesman had voluntarily advised, counseled and suggested to ap-

pellee's witnesses that, "You fellows ought to buy Hostetter's Bitters in bulk; that is the cheapest way; we wouldn't handle Hostetter's Bitters if we couldn't also sell them in bulk. The same company that puts up the case goods also sells them in bulk * * * the price is $2.25 a gallon, and that will make nearly eight bottles. * * * You can get a bottle of Hostetter's Bitters and then fill that up whenever it gets empty." (Tr. pp. 110, 180, 590, 591, Defendant's Exhibit No. 1.)

It will be remembered, that the said advice, counsel and suggestions were given by appellant's salesman, to entire strangers, and if appellant would so deal with strangers and transient customers, how much more willingly would they do likewise with regular customers, and with "The Faithful."

As to Appellee's Depositions.

Appellant's counsel makes "Much ado about nothing," with "Fuss and Feathers," regarding the *manner* in which certain of appellee's depositions were taken. (Opening Brief pp. 7 to 12, and Supp. Brief pp. 4 and 5.)

It has been decided over and over again that:

"Objections to the form of the commission, or the *manner* of taking the depositions, or to other irregularities, *must* be made at the time the deposition is taken, if the party is present, or by a motion to suppress *before the trial*, or they will be deemed to be waived, *because* such defects, if presented in time, may be corrected by a re-examination of the witness."

Encyclopedia of Pleading and Practice, at page 629. (Depositions—Objections—When waived. Ed. 1896).

The Supreme Court of the United States, in Howard vs. Stillwell, 139 U. S. 199, 205, declared:

"It is the settled rule of this Court that the failure of a party to note objections to depositions, of the kind in question (to the form of the commission and the manner of taking the deposition,) when they are taken, or to present them by motion to suppress, or by some other notice before the trial is begun, will be held to be a waiver of the objections. Whilst the law requires due diligence in both parties, it will not permit one of them to be entrapped by the acquiescence of the opposite party in an informality which he springs during the progress of the trial, when it is not possible to retake the deposition. Shutte vs. Thompson, 15 Wall. 151, 158 et. seq., Mechanics' Bank of Alexandria vs. Seton, 1 Pet. 299, 307; Winas vs. New York and Erie Railroad, 21 How. 88, 100: York Company vs. Central Railroad, 3 Wall. 107, 113: Doane vs. Glenn, 21 Wall. 33, 35: Buddicum vs. Kirk, 3 Cranch, 293, 297: Rich vs. Lambert, 12 How. 347, 354."

"A motion to suppress a deposition or a portion thereof for defects or causes which may be remedied on a re-examination of the witness must be made *before* the trial is begun."

Carlisle vs. Humes, 111 Ala. 672, 20 So. Rep. 462.

"A motion to suppress a deposition for objections appearing on its face must be made, and a decision had *before* the beginning of the trial, and the overruling of such motion made after commencement of the trial is not error."

Truchey vs. Eagleson, 15 Ind. App. 88, 43 N. E. Rep. 146.

The objection to the reading of a deposition at the trial is an objection "that cannot be made at the hearing. It should have been made by a motion to suppress *before* the cause was set for hearing, when, if allowed, the mistake might have been corrected by retaking the deposition. When a cause is set for hearing all technical objections to the reading of the testimony on file are waived."

York Co. vs. Central R. R., 3 Wall. 113.

Blackburne vs. Crawfords, 3 Wall. 191.

Smith vs. The Serapis (D. C.) 49 Fed. 393, at page 398, decides that a motion to suppress depositions, *not made until the hearing*, one month after the depositions have been returned into court and opened, and the case is set for hearing, is made too late; notwithstanding there was not a reasonable notice given of the taking, the depositions having been taking at Beaufort, S. C., on Sept. 22d, under a notice served in Baltimore on Sept. 19th, and did not allow sufficient time for the libellant to be represented at the examination and to cross-examine the witnesses.

In the case of Claxton vs. Adams, 1 MacArthur, 496 (D. C).

"The objection to the admissibility of a deposition as evidence in a cause should be made by motion to suppress *before* going to trial. The objections in this case, therefore, came too late, even if they

would have been good on a motion to suppress. The issues were closed in the case and in Feb. 1873, the same were ordered on the then calendar (for Jan. term, 1873) by the Court. In March 1873, and while the January term of the court was still in session, the plaintiffs gave notice to the defendant that they would proceed to take the deposition of George Ramsen, and other witnesses, on the 17th, day of March, 1873, before a United States Commissioner in Philadelphia.

No commission to take the deposition was issued by the Court, but the same was taken in pursuance of said notice, and returned in the clerk's office of this Court on the 20th day of March, 1873. The case came on for trial March 11, 1874, and a jury was sworn to try the case.

The plaintiff offered to read in evidence, the deposition so as aforesaid taken, to which the defendant objected. The objection was overruled; to which ruling the defendant excepted.

The deposition being all the evidence, judgment was given for the plaintiffs.

The exception presents the question, whether the Circuit Court erred in overruling the defendant's objections." (Held not to be error).

In the case of Bank of Danville vs. Travers, 4 Bissell 507, being a Motion to suppress depositions for insufficiency of the Notarial certificate, the depositions having been returned and opened in July, 1865; it was said by

Drummond J.—"I think *after* a cause is set down for a hearing, and the deposition has been on file for three years, it is too late to move to exclude it on a technical ground. I think the parties have a right to presume that such a delay is a waiver of any objection of that kind."

The general rule is that all objections or excep-

tions to the formality of depositions must be taken *before* trial.

Corgan vs. Anderson, 30 Illinois, 95.

The depositions in the case at bar, to which objections have been made, were returned into court and opened, and subjected to the inspection of appellant, on May 25, 1900, and the cause was tried in March 1901, nearly one year after the inspection of the deposition by appellant, but no motion was made during all that time, to suppress the depositions, and no motion has ever been made, *at any time*, to suppress the depositions, on the ground for insufficiency of the Notarial certificate, and hence as to that, it should be deemed that appellant has waived the same.

No legal grounds have been shown for the suppression of the depositions, but the grounds upon which the objections have been urged are most imaginative and chimerical, and nothing has been alleged which tends to show that the depositions are either unfair or unjust to appellant.

The depositions, taken on Dec. 18, 1899, at Pittsburgh, Pa., were taken after counsel for appellant had been duly and reasonably notified thereof, (Tr. pp. 93-94) but no attempt was made by counsel to be present or to be represented, and we are forced to the conclusion that counsel for appellant trusted in the hope that some technical objection would be available to interfere with the using of the depositions on the trial, when it would be impossible for

appellee to retake the depositions, for, although the depositions were returned into the Lower Court and opened to the inspection of counsel for appellant on May 25, 1900, (Tr. p. 105), no notice was given nor motion made, by appellant that the depositions were objected to, or that a motion would be made to suppress the same until *after* the cause had been called for trial and such action does not speak well for the honesty or integrity of appellant's counsel to thus seek to deprive appellee of the opportunity to retake the depositions, or to supply the deficiencies, and the writer's colleague, Mr. A. H. Clarke, was warranted in saying that he was "surprised" at the motion to suppress the depositions *after* the trial of the case had been commenced.

But the courts have long since provided against such crafty practice, and have many times and uniformly held that a motion to suppress depositions for formal defects, must be made *before* the trial is begun.

In the case of the American Exch. Nat. Bank vs. First Nat. Bank, 27 C. C. A. 274-277; 82 Fed. 961, the Court, in referring to the matter of a notice to take deposition being short, where no effort appeared to have been made to secure a postponement of the examination; and refused to suppress the deposition, said:

"In times past the statutes providing for the taking of testimony by deposition were construed with great strictness, and any deviation from the provisions thereof was held fatal to the deposition, but

since the amendment of the statute requiring notice to be given, and, under the more enlightened views obtained at the present time in regard to the effect of purely formal defects in matter of procedure and practice some merely informal deviations from the statutory provisions regulating the taking of testimony are not held fatal thereto."

Kansas City, F. S. & M. R. Co. vs. Stoner, 2 C. C. A., 437-444; 51 Fed. 649.

"Objections to the reading of depositions, taken with notice, should be substantial (showing prejudice or injury), and not technical, before it should be sustained."

As to Right to Use a Name.

Lever Bros. Limited Boston Works, v. Smith; 112 Fed. Rep. 998, 1000.

In this case it was said: "An order may be entered for an injunction restraining the defendant from using the word "Welcome," segregated from the surname or in larger type or letters than the surname, or so located as to admit of the inference that the soap is Welcome Soap, manufactured by A. Smith, would be restrained."

Sterling Remedy Co., vs. Spervine Medical Co., 112 Fed. Rep. 1000 (N. Dist. 111.)

Neither one's name, nor a geographical name, nor a name descriptive of a quality can be used for the purpose of perpetrating a fraud which affects the public.

Meyer Medicine Co., 7 C. C. A. 558; 58 Fed. Rep. 884.

Pillsbury vs. Mills Co., 12 C. C. A. 432; 64 Fed. Rep. 841.

Mills Co., vs. Eagle, (C. C.) 82 Fed. Rep. 816.

Williams vs. Mitchell, 45 C. C. A. 265, 106 Fed. Rep. 168.

Reddgway vs. Banham (1896) App. case 199.

La Republique Francaise vs. Saratoga Vichy Spring Co., 107 Fed. 459, 46 C. C. A. 418.

(Note to Elgin Nat'l. Watch Co., vs. Illinois Watch Co., 45 U. S. 1. Ed. at page 379.)

"Manufacturers of bitters from a *secret* recipe, which have become widely known as 'Angostura Bitters,' from the name of the town where first manufactured, * * * are entitled to enjoin the use of the word 'Angostura' upon a different bitters * * * where such use was calculated to deceive the public."

Siegert vs. Findlater, 7 Ch. Div. 801, 47 L. J. Ch. N. S. 233, 38 L. T. N. S. 349, 26 Week. Rep. 459.

In the case of Van Hoboken et al. vs. Mohns & Kaltenbach, 112 Fed. 528, 530, the Court says:

"A fundamental principle in the law of trademarks is the protection of the owner of the trademark against fraud in its use by others. This fraud may consist in such a use of a *trade name*, or mark, as to induce purchasers to believe that they are obtaining the article which has won reputation under the particular *name* or mark."

In the case of N. K. Fairbank Co., vs. Luckel, King & Cake Soap Co., 42 C. C. A. 376, 379, 102 Fed. 327, 331, Judge Hawley, speaking for the Court of Appeals for the Ninth Circuit, said:

"It must constantly be borne in mind that there are two kinds of trade-marks—one of peculiar pictures, labels, or symbols; the other in the use of a *name.*"

Even a man may not use his *own* name, in connection with his business transaction, in such a tricky manner as to injure another's business; (how much less will a Court of Equity allow the use of another's name to the detriment of that other person).

In the case of International Silver Co., vs. Wm. G. Rogers Co., 113 Fed. 526, 527; the Court quotes and adopts the following language:

"A tricky, dishonest, and fraudulent use of a man's *own* name for the purpose of deceiving the public and of decoying it to a purchase of goods under a mistake or misapprehension of facts, will be prevented."

As to Requiring Two Witnesses.

In the case of the United States of America vs. Parrott, et al., 1 McAllister, 447, 451, the Court says:

"Can it be contended with any reason, that when the parties come into a Court of Equity, that tribunal will award to an answer whose denials of forgery and ante-dating are made 'Upon information and belief,' the character which the law annexes to an answer where the denial of the fraud is on personal knowledge?"

"The allegations of a bill, are mere pleadings; the averments in an answer responsive to them, are regarded as evidence equivalent to two disinterested witnesses, or one witness and strong corroborative

circumstances. To consider that the denials of an answer on 'information and belief' are to be deemed sufficient because the allegations of the pleadings are not sworn to from personal knowledge, simply is to confound the distinction which exists between pleading and evidence."

(And we might add: How much more so, as in the case at bar, where *no* "Knowledge or belief," even, is alleged to exist.)

Replying more fully to the cases cited in Appellant's Brief pp. 24-25, as to appellee having no exclusive right to make Hostetter's Bitters, or to call them by that name, (counsel complaining because of our brevity, Supp. Brief, p. 21):

Hostetter vs. Adams—10 Fed. 838; does not decide that the plaintiffs have no exclusive right to call the stomach bitters they make "*Hostetter's* Stomach Bitters;" but only that their trade mark is not in the words "Celebrated Stomach Bitters," and we might add, that any one who can, has the right to make "Celebrated Stomach Bitters," but must leave off the word "Hostetter's."

Hostetter vs. Fries—17 Fed. 620, is a decision rendered on application for a *preliminary* injunction to to restrain defendants from selling certain essences, oils and extracts, which could be so manipulated and used as to *produce* an imitation of Hostetter's Bitters, and not from selling the imitation bitters, the Court saying that, "Complainant's property consists in the right to use the name "Dr. J. Hostetter's Stomach Bitters" in connection with certain labels,

bottles, and other devices, which designate the preparation as of their own manufacture, and indicate its origin."

But by the evolution of the doctrine of unfair trade, as administered by the courts of equity at this time, this case is no longer good law, and, as is said by the author of "Hopkins Unfair Trade," (an authority quoted by appellant) on page 190, in note 2, to section 87, referring to this (Fries) case "This decision is entitled to no weight," And adds, (in note 1 on page 191, after referring to Hostetter vs. Bruggerman—Reinart Co., 46 Fed. 188, and to Hostetter vs. Sommers, 84 Fed. 233,) "These cases overrule Hostetter vs. Fries, 17 Fed. Rep. 620."

The dictum found in this (Fries) case, (founded on the erroneous assumption that Dr. Hostetter had made known and published his formula or recipe for the compounding of the Hostetter's Bitters) that "The complainants have not the exclusive right to make Bitters compounded after the formula of Dr. Hostetter, nor the exclusive right to sell Bitters by the name of Hostetter's Bitters" has been overruled in the more recent (1901) and better considered case of Hostetter Co., vs. Conron, 111 Fed. Rep. 737, in which the Court says:

"This is an action to restrain unfair trade. The defendant is charged with having sold a cheap imitation article as genuine Hostetter's Bitters. These

Bitters are prepared only by the complainant. They are made by secret formula. The law applicable to this situation is well settled and need not again be stated. Hostetter Co., vs. Brueggerman-Reinart Co., (C. C.,) 46 Fed. 148; same vs. Sommers (C. C.) 84 Fed. 333; same vs. Bower, (C. C.) 74 Fed. 235; same vs. Comerford (C. C. 97 Fed. 585.)" (The decree as prayed for was granted.)

Singer Mfg. Co., vs. Riley, 11 Fed. 706, was for a *preliminary* injunction, and the patent on the machine had expired and Congress had refused to renew it.

In the case of Singer Mfg. Co., vs. Larson, Fed. Cas. 12, 905, the patents had all expired. Also, in the case of Centaur Co., vs. Heinsfurther, 84 Fed. 955, the patent had expired, and thereupon became public property. And the case of Centaur Co., vs. Marshall, 97 Fed. 785, was for a *preliminary* injuction. In Watkins vs. Landon, 54 N. W., Rep. (Minn.) 193, the facts appear to be, that in 1856, and prior thereto, one Ward, made and sold, under the name of "Ward's Botanical Liniment," a medicinal compound, prepared in accordance with a formula or recipe owned by him. In that case it appears he had sold and *imparted* to one Sands the *formula* for making the liniment.

It is very evident, without argument, that this last mentioned case is not authority for the position taken by the appellant, but on the contrary, is very good authority for the position occupied by the appellee, as

appellee never "Sold and imparted to any one the formula for making Hostetter's Bitters."

The trade-name, "Hostetter's," used in the preparation and sale of Stomach Bitters, has been so used for more than forty years by the appellee and its predecessors in title, in a very extensive trade, with unbroken acquiescence, save the occasional instances as shown by litigation in the courts.

It does not indicate merely that the appellee is the manufacturer and producer of the Stomach Bitters sold under that name, but quite as much that it is compounded and put on the market under appellee's implied representation of uniform quality and excellence. "Courts of equity have the power to protect trade-names, such as this, otherwise a manufacturer, producer or dealer, who furnishes goods of such excellent quality that they build up so extensive trade as to gain a distinctive name to their merchandise, would be defeated of the just fruits of his industry and integrity by the very fact of his own meritorious conduct."

Atwater vs. Castner, 32 C. C. A. 77-79.

No one had ever used the word "Hostetter's" in connection with the making or selling of Stomach Bitters, before appellee and its predecessors, and neither the appellee nor its predecessors, have ever acquiesced in the use of the word "Hostetter's," in connection with the manufacture or sale of Stomach Bitters, as shown by the prosecution of several suits to a finality for an infringement of their rights

therein, clearly showing a lack of acquiescence; and the fact, as shown by the evidence, herein, that the word "Hostetter's," had been several times registered in the patent office as a trade-mark or a trade-name, (Tr. p. 70, 380-Int. p. 395 Ans. to Int. 3,) is entitled to weight in determining the question that the trade name indicates, and is understood to refer to, the maker or producer of "Hostetter's Stomach Bitters," and that it is *not* "merely descriptive of the character and quality of the goods to which it is applied."

Hygeia Distilled Water Co., vs. Hygeia Ice Co., 40 Atl. Rep. 538.

The assumption and use of the name "Hostetter's," in connection with the sale of Stomach Bitters, by the appellant, was so assumed and used "with a view to deceive the public, and to induce the belief that the product marketed and sold was prepared under his (Hostetter's) supervision, and offered to the public with his sanction. Under such circumstances, equity will not hesitate to extend its preventive arm."

Kathreiner's Malzkaffee Fab. vs. Pastor Kneipp Med. Co., 27 C. C. A., 351-355; 82 Fed. Rep. 321. (See, also, note at end of case.)

"The name (Hostetter's) indicated the origin, and was a guarantee of the superior excellence of the goods, and was so recognized."

The Peck Brothers & Company vs. Peck Bros. Co., 113 Fed. 291-296.

"In Appellant's Supplemental Brief," (p. 2) counsel says, "If there had been any attempt on the part of the appellant to run appellee's goods out of the market, the appellant's own goods would invariably have been set forth; but in not one instance was this the case." Why does he say *invariably?* We do not think appellant would invariably set forth his own goods *to a stranger*, even when it desired "to run appellee's goods out of the market," by substituting therefor other bitters, as is clearly shown, in this instance, by the testimony of Paul Samuel (Tr. fol. 232), where, to the leading and suggestive question of appellant's counsel, "Did you suggest to them that these H. Bitters were Hostetter's Bitters or genuine Hostetter's Bitters sold by the complainant or made by them?" made answer, "No, sir; I told them that the bitters were better than Hostetter's Bitters. They were bitters better than Hostetter's Bitters, and *naturally tried to sell my own bitters.*"

We do not doubt that it was quite *natural*, judging from the conduct of appellant, for them to try to sell their own bitters, even to the extent of representing them to be genuine Hostetter's Bitters. Samuel never said, "They were a bitters better than Hostetter's Bitters," as is shown by his testimony just previously given (Tr. fol. 231, 232), and this latter statement was an after thought given in response to

said suggestive and leading question, and which was objected to on that ground. (Tr. fol. 232).

Out of the mouth of appellant's principal witness, Paul Samuel, is appellant convicted of possessing the spirit and using the means of "unfair competition," and is shown not to be "honest in its business transactions," and does not "rely upon the merits of its own goods," but "undertakes to palm off inferior goods as for goods of the genuine manufacturer," whereby, with a single article of its merchandise, appellant is able not only to injure "Hostetter," by the use of the *initial* letter "H," but many other persons, whose initial letter of name is the letter "H," and of course, thereby deceives and commits a fraud upon the public; and not only so, but the fertility of counsel in exactly describing, and the ingenuity of the witness in cheerfully approving, the scheme, in that respect, seem to be relished by them.

The testimony is as follows:

"Q. 22. There are a great many different kinds of bitters?

A. Yes, sir; a great many.

Q. 23. Are there any different kinds of bitters commencing with the letter "H" as an *initial* of the *name* of the bitters?

A. I know of a great many, yes, sir.

Q. 24. Tell me a few?

A. There is Huffland; Dr. Hanley's; Highland Bitters; Herb Bitters; Hoff Bitters; Hamburg Bitters. Those are all bitters on the market. (Tr. p. 235).

The statement, (Supp. Br. 3), that appellee's witnesses "lied to appellant, giving the name Hatch instead of their own names, (Tr. pp. 182, 588), and saying they had broken the bottle, which they had not," (Tr. pp. 199, 200), is, to say the least, a misstatement made by counsel and which he knew to be untrue in fact, if so be he knew what was in the record, for neither of the witnesses said his name was Hatch, nor did they say they had broken the bottle which they had not. In answer to Paul Samuel's question, "Who shall I make this bill out to?", Mr. McEvers replied, "L. H. Hatch." (Tr. p. 182). Nothing else was said relating to that matter. As to the broken bottle. Mr. McEvers said to Mr. Samuel "We broke our Hostetter bottle a few days ago," and he (Samuel) then said to the man who was going up the stairs with demijohns for the goods, "Bring down an empty Hostetter's bottle with you." The man soon returned with the demijohns of wines and Hostetter's Bitters and an empty bottle." (Tr. p. 191, 126, 127). Nothing more was said relating to that matter.

Nothing was said about the broken bottle being the one obtained from appellee, the fact was that as soon as the statement was made that a Hostetter bottle had been broken, and before any explanation could have been given, Mr. Samuel directed a man to "Bring down an empty Hostetter bottle with you."

Mr. R. H. Countryman, counsel for appellant, was associate counsel in the case of The Hostetter Com-

pany vs. E. Martinoni, case No. 12,780, In Equity, in the Court below, and being one of the cases referred to herein, (Tr. pp. 251, 271), and we presume that he is familiar with the testimony given in that case, and if so he knows that the evidence in the Martinoni case shows that a Hostetter bottle was broken, the fragments of which were offered and admitted in evidence in said case, as complainant's Exhibit No. 7 and was exhibited to the Court upon the trial of that cause, and now remains as such exhibit therein, and we think that we are justified in now saying, that counsel has not shown good faith, and an honest purpose, in charging that appellee's witnesses lied in their testimony relating to the name "L. H. Hatch" or to the broken bottle, and especially is this belief strengthened when it is remembered that counsel in asking the witness, McEvers, about the broken bottle, (Tr. pp. 199, 200), limited it to a bottle obtained from appellant, by asking this question: "Q. 3. Did you break the bottle or any Hostetter bottle *which you obtained from Samuel Bros. & Company.*" (Tr. p. 200).

And so might we very properly stigmatize many of the erroneous statements of counsel, injected into appellant's briefs, presumably for the purpose of thus insidiously misleading the Court, with the hope that the appellee's cause will be thereby prejudiced, and the appellant's benefited; a few of which statements we specify:

(a) Referring to witness (Morrison), "Probably

his hard swearing on the eastern circuit had made him ill," (Supp. Br. 3), when he had never been in the employ of appellant there, or a witness for it there.

(b) The statement, "There is no such evidence," (Supp. Br. 2.) that, "Upon application for Hostetter's Bitters" (Tr. 8), "instead of giving him Hostetters, Bitters, appellant gave other Bitters, representing it to be appellee's Bitters, and suggesting that the purchaser sell it as and for appellee's Bitters," (Supp. Br. 2), must be known, by counsel, to be false, for the reason that much evidence was adduced in the very presence and hearing of counsel, to that very effect. (Tr. pp. 110, 180, bottom 181, top 182, 590, 591, 592—"Defendant's Exhibit No. 1.")

(c) The statement: "The genuine goods were always produced." (Supp. Br. p. 2,) The genuine goods were *not* always produced, (and never produced except to strangers,) for there is no pretense in this case that they were produced at the *second* visit of appellee's witnesses. Also, said witnesses never "suggested Bulk Bitters," but on the contrary the same was suggested by appellant's salesman. (See Tr. pp. 110, 180, bottom 181, top 182, also 590, 591, 592—"Defendant's Exhibit No. 1").

No "act of appellant which the appellee has cited as fraudulent took place at the direct instance or request of the appellee's agents," (Supp. Br. 3). (See Tr. p. 110, and as last above cited), and so "the irresistible force of this position will appeal to the Court," but not in the manner hoped for, and suggested in Appellant's Supplemental Brief, page 4.

The wild and unreasonable hope of counsel that this Honorable Court can be induced to look through counsel's distorted medium of vision (Appellant's Briefs) and see what "would seem enough to prejudice appellee's case," (Supp. Br. 4), is not well founded.

Even at the time of the trial (after the trial had been commenced), appellant's objections to the reading of the depositions, were five, only, and were as follows:

First. "Because timely notice of the taking of said depositions had not been given, and

Second. Because insufficient time had been allowed for Respondent's counsel and solicitors to reach the place of the taking of said deposition, and

Third. Because the taking of said depositions was had before the time for which the same was noticed, and

Fourth. Because the taking of the same was adjourned for more than one day, and adjourned from day to day, and

Fifth. Because it appears that the taking of said depositions filed in the causes of The Hostetter Company vs Martinoni, No. 12,780, and the same complainant against Modry—12,779, Ahrens—12,786, Levy—12,787, Carroll—12,790, Venaglia—12,793, Marish—12,794, with which cause this cause was argued and tried, and heard before the Court, were carbon copies, and that the witnesses therein had not testified in the several different causes and that

it was not shown in which of said causes, if any, said witnesses had so testified, and that the same typographical mistakes appear in each of said depositions and in the depositions taken under subsequent commissions in said causes, and that the taking of said depositions were noticed at the same day and hour of the day." (Tr. p. 566).

The manner of taking the depositions was set forth in the notice to take said depositions, which recited that appellee would "proceed to take testimony in shorthand, to be afterwards reduced to writing upon a typewriting machine, on behalf of Complainant, for final hearing in the above-entitled cause." (Tr. p. 94).

No exceptions or objections were *ever* made to the *manner* of taking the depositions, i. e., first in shorthand to be afterwards reduced to writing upon a typewriting machine (and which was done). We have examined the depositions of the testimony in the case at bar and find that the same is an original, and not a carbon copy, and we fail to see the force of the argument that because, forsooth, the commissioner (the Notary Public) in transcribing the depositions, (all being to the identical questions and subject matter, would of necessity, if truthful, be identical in form and substance), may have used some carbon copies, in some of the cases, instead of the original copy, gives no ground for complaint, for they were all duly signed and executed by the re-

spective witnesses, and shows neither prejudice nor injury to appellant.

In appellant's answer filed in this case, "defendant admits that no other person or persons, firm, or corporation has the right to deal in or sell any article of Stomach Bitters under any of said names, ("Hostetter Celebrated Stomach Bitters," or "Hostetter," or "Host," or "H. Bitters,") not made or compounded, (by appellee), either in bulk, or by the gallon, or in the bottles once used by complainant, or those resembling complainant's, to an extent calculated to mislead or deceive." Also, "This defendant admits that he has been informed and does believe that the Stomach Bitters prepared by complainant have been and are put up and sold as alleged in the third paragraph of said Bill of Complaint, to-wit, in an amber-colored bottle, holding nearly a quart; with the words "Dr. J. Hostetter's Stomach Bitters" blown in the bottle; Said bottles having thereon certain labels, copies of which are attached to said bill of complaint and marked "A" and "B"; Also, "This defendant admits the popularity of the Stomach Bitters made and sold by complainant;" Also, "Defendant admits that it had sold, and is now selling and intends to continue to sell, at its place of business an article of Stomach Bitters slightly resembling the Stomach Bitters made by Complainant in color, taste and smell." (Tr. pp. bottom 18, 19, 20, 22).

After appellant made the above-mentioned admis-

sions, in the pleadings in the case, why does it now, through its counsel, strive to entrap the Court, by seeking to befog the real issues in the case, in many ways, a few of which we notice:

By endeavoring to divert the Court's attention to matters to which no exceptions or objections were taken in the Court below, and concerning which this Honorable Court are not interested, and of which no notice can be taken, such as:

(a) "It is evident from the depositions themselves that the witnesses did not appear and give their testimony, and that the certificates of the notary public that the witnesses appeared before him is not true." (Appellant's Opening Brief, p. 8).

These statements were made in the face of the record that the testimony of the witnesses was taken in shorthand and afterward reduced to typewriting, and was signed by the witnesses, and so certified to by the notary public, with no pretence of showing to the contrary. We can think of no imaginable excuse for such trifling with a Court of Justice.

The effrontery and temerity of counsel in introducing to a Federal Court of Equity such palpably fraudulent statements, and expecting to use them as evidence, is as serious a breach of professional etiquette and candor, nay, of the duties of an attorney, as it is a failure of evidence.

(c) "The authorities that the omission of the officer taking the deposition to certify that he reduced the testimony to writing himself, or that it was done

by the witness himself, in his presence, is fatal to the deposition, and that such facts will not be presumed, but must clearly appear from the certificate, and that the officer must certify that he reduced the deposition to writing in the presence of a witness." (Opening Brief, p. 41).

No objection or exception was *ever* taken or offered to any certificate of the officer taking any of the depositions, and we think the court would be fully justified in believing that such statements by counsel, as above must be made solely for the purpose of befogging the issues of the case.

(d) "It may be noted that the certificates do not show, nor was there any proof offered to the effect that the witnesses named in said depositions were not within one hundred miles of San Francisco at the time of the trial of the cause." (Opening Brief, p. 42.)

Doubtless this statement was made for like purposes as the one above, for counsel knew "that the witnesses named in said depositions" resided in Pittsburgh, Pa., as shown by the depositions and that the Court would take judicial knowledge of the fact that Pittsburgh is "not within one hundred miles of San Francisco." (Mutual Ben. Life Ins. Co. v. Robinson, 58 Fed. 723.)

(e) By introducing matters *dehors* the record.

"That one of the two (witnesses) was temporarily in the employ of Reddington & Co., the local distributor of appellee, until just after the trial, so as to give him

a prestige of being connected with the direct trade, and also to keep his testimony in line, while immediately after the trial he was discharged."

The above statement is entirely gratuitous, unfounded and wholly false, but entirely in keeping with many other statements of counsel for appellant. And as to that part of the statement, "While immediately after the trial he was discharged," the writer believes to be false and untrue, for he never heard of him (McEvers) having been discharged, but that he left the employment of Reddington & Co., for the betterment of his condition, and is even now employed by E. J. Wittenberg Co., Wholesale Druggists, in San Francisco. Neither of these witnesses, (McEvers & Morrison) were impeached by counsel during the taking of the testimony in the case, when they could have defended themselves and being the only *legal* way and time in which they could be impeached, but it was left for the questionable manipulations of counsel in his briefs to attack and attempt to slur their characters. They were unimpeached, and in fact, were and are unimpeachable.

(f) Referring to appellee's witnesses, "In one case, appellee's two spies, during the hearing before the examiner, were confronted with samples, and could not tell that of the appellee from that of the defendant, although they pretended to be experts." (Supp. Br. 39.)

That there is nothing in the record to even suggest

such a statement, much less to support it, makes no difference to counsel so long as there is hope that the Court may be influenced thereby, and notwithstanding the more serious fact that the statement is false.

Appellant's counsel, referring to appellee's medicinal preparation, says (Supp. Br. p. 42):

(g) "No sane man would expect to find medicine as strong in alcohol as a drink of whiskey, or a whiskey cocktail."

Counsel must have known that the above statement was intended to mislead and prejudice the Court against appellee, by insidiously insinuating that the genuine "Hostetter's Bitters" contains as much alcohol as whiskey, when he knew by the evidence produced by appellant—the alcohol does not exceed 34 per cent. by volume, while the testimony of the very competent chemist, (Prof. Thomas Price) appointed by the lower Court, shows that the percentage of alcohol in whiskey, "goes all the way from 60 per cent. up to 80 per cent." (Tr. p. 540.)

(h) "Is this appellee with its record of wrecked homes, shattered lives, deaths and skeletons, deserving of any equitable consideration?" (Supp. Br. p. 50.)

The above false, reckless and slanderous statement is made, not only in the absence of the record of all evidence showing, or even tending to show such a condition or state of things attributable to appellee, but on the contrary where the most strenuous efforts and careful searching, by appellant for such evidence

completely failed to reveal a single instance where any man, woman or child had been injuriously affected by appellee's medicinal preparation, whereas, on the contrary, much clear, concise and convincing testimony of many witnesses on behalf of appellee, proves that much good, and no harm, is done by the use of said preparation.

Counsel in his statements, recks but little, whether within or without the record, if by any means the Court may be led to confusion and appellant be profited thereby, and the cause of the appellee be prejudiced in the mind of the Court.

By unjustly and without excuse, heaping unmerited abuse upon Mr. Clarke (of counsel for appellee,) and charging him with fraud, slurring the lower court, cajoling and threatening this Honorable Court:

(i) "Mr. Clarke knew then, before preparing the interrogatories, the discrepancy between the Wuth and Curtis analyses, and the reason therefor, yet he willfully omitted to make this known to Dr. Golding, sought evidence from him to show that the amount of alcohol had been 'pushed up' when he knew it had not been, concealed from Dr. D' Homergue and Mr. Wuth that the alcohol in the Curtis analysis was 'by volume,'" and the long, venomous and uncalled for tirade against Mr. Clark following. (Supp. Br. pp. 44, 45, 46.)

Mr. Clarke is a gentleman, now seventy-six years of age, admitted to and has practiced in many of the Federal Courts of the United States, including the Supreme Court of the United States, and against whom not one breath of suspicion or unprofessional

conduct ever was charged, or can be justly charged or brought against him; and in this instance, there is no reason or foundation for this unprofessional act and unjust attack, being made on Mr. Clarke by appellant's counsel, but which was probably inspired by Mr. Gardiner, in whom appellant's counsel says he takes "Great pleasure in acknowledging the most valuable assistance." (Supp. Br. p. 52.)

(j) In the opinion rendered by the lower court in this case, the distinguished Judge, speaking of complainant's preparation, uses the following language: "The fact of its being alcohol to a certain extent cannot be unknown to the public, as the very word 'Bitters' can only be defined as 'a liquor, generally spirituous, in which bitter herbs or roots are steeped."

To this language, used by the lower Court, counsel for appellant thus slurringly replies: "There was some contention that the public ought to know that the Bitters were alcoholic, because the word 'Bitters' was notice of that fact." (Supp. Br. p. 42.) And further to the same effect, "we think the distinguished Circuit Judge overlooked the testimony of defendant's witnesses, and the very flimsy character of the testimony produced by appellee as to any wrong-doing by appellant from the fact that a number of similar cases were argued and submitted at the same time." (Opening Br. p. 13.) And still further, to the same effect, "Only a few days ago, in the case of Martini vs. Sarocca, Circuit Court No.

12,893, Judge Morrow, of this circuit, dismissed the case on account of complainant's failure affirmatively to show title to a label to which they undoubtedly had a title, and it is only, to our minds, because Judge Morrow overlooked this point in deciding this case, that our case failed to go off on the same ground." (Supp. Brief p. 10).

Counsel would have this Court to believe that Judge Morrow was either negligent or incompetent, or both.

As to cajoling this Court:

(k) "We have not thought it necessary for us to demonstrate to the court that the laws of Pennsylvania require a confirmation of sale of personal property." (Supp. Br. p. 7).

While we very properly credited this Court with the knowledge of the fact that the laws of Pennsylvania do not require the confirmation of sale of personal property, but of real estate only, (Purd. Dig. —Decedent's Estates, Sec. 110, Et seq. p. 427,) we cannot resist the conclusion that counsel had hope that something might be gained by persistency in that line.

(l) And further, to the same effect, "we recognize the fact that defendant in such an action as this comes into court under a cloud, and that the tendency has been almost to presume him guilty," *et seq.* (Supp. Br. p. 12).

(m) And still further to the same effect, "We envy this Court its opportunity. It is not often that so large an opportunity to do good and to check evil

is presented. A decision for appellant will work a world of good throughout this land, and will stand as a precedent which will make quacks hesitate before they 'put their money into a bag with holes.' " (Supp. Br. p. 51).

We feel there could be no stronger statement of the fact that "A decision for appellant" will totally ruin appellee's business, which by long years of honest dealings and business fidelity has won for it an enviable position in the business world, and would open wide the door for a fraud upon the public, by the sale of what is admitted to be, by appellant, "An alcoholic stimulant," such as was bought from appellant, (Opening Br. p. 75) instead of the medicinal preparation, proven to be beneficial, manufactured by appellee. (See testimony cited—Appellee's Br. p. 5).

As to threatening this Court:

(n) That this Court might be placed *in terrorem*, appellant says:

"We call the Court's attention to a conflict between the opinion of the Circuit Court in the case at bar, and the opinions of other circuits as shown by the cases reported in 10 Fed. 338; 17 Fed. 621; 62 Fed. 600; 74 Fed. 235 and 97 Fed. 585, and assume that, if requested, this Court will certify the question herein to the Supreme Court." (Opening Brief pp. 74 and 75.)

"What does this mean?" What this means, and only can mean, is, that this Honorable Court is warned and threatened beforehand, by counsel for appellant, that, if it dared to affirm the acts of

the lower Court, an appeal will be taken "to the Supreme Court," thus seeking, but vainly, to intimidate the Federal Court, which courts are the bulwarks of our American institutions, worthy of all confidence, admiration and respect; but it seems that the appellant's thirst and love for the commercialism of the age, aided by the heated and intemperate language of its counsel, spares not even our best and dearest, but invades with menaces the sacred precincts of our most cherished institutions and destroys the ideals of our profession, and drags the practice of law down to the meanest and most detestable purposes.

The Federal Courts hold a power which is mighty for good in the dealing with iniquity. They may work wonders in suppressing fraud, and fraudulent practices in trade, and may even make men honest, at least outwardly, as was done by an injunction by the lower Court in the case at bar, after finding that the facts presented "a clear case of unfair competition in trade, and the doctrine rests squarely on the proposition that men must be honest in their business transactions and rely upon the merits of their own goods, and not to undertake to palm off inferior goods as and for goods of the genuine manufacturer." (Tr. p. 559).

"We have confidence that the Federal Courts are alive to this, and that they will assert themselves to the great gratitude of a long-suffering public," and

will sustain the just and equitable findings and actions of the lower Court, and dismiss this appeal with costs.

Respectfully submitted,

E. Edgar Galbreth,
Solicitor and Counsel for Appellee.

ADDENDA; By Mr. Clarke.

PITTSBURGH, April 5, 1902.

Through the courtesy of the clerk, Mr. Monckton I have received "Appellant's Supplemental Brief."

At the final hearing of this case September, 16, 1901, I had with me a couple of printed briefs and offered to exchange with defendant's solicitor, which offer was not accepted. I left a copy with the Court and gave one to the Clerk; afterwards sending copies from here.

Some weeks afterwards I received a type-written copy of a most abusive paper called a "Brief," and signed by the same William M. Gardiner, whose name appears at the tail end of the present "Appellant's Supplemental Brief," and the vile, false and ungentlemanly language is substantially the same in both.

Why this Mr. Gardiner should have conceived so much hatred for me, personally, is difficult to understand. He had unlimited time in which to speak, and in reply, my time was quite limited. I only now recall the fact that I complimented him upon having delivered a masterly temperance address, which, at the time, struck me as quite after the language of the noted Temperance Lecturer, Murphy, yet I refrained from accusing him of indulging in plagiarism. His expressions "record of wrecked homes, shattered lives, deaths and skeletons," are quite like Murphy.

This same Mr. Gardiner appeared at the hearing of this case, although he is not the solicitor of record, and if we too, may "read between the lines," was the instigator of this delay in the case, through the application for privilege to file another brief. Mr. Countryman fathers the last brief, yet it does not sound like the first, nor does it remind one of his oral argument. I was at the time of argument, more impressed with the personal appearance of the gentleman; his handsome face, energetic and forceful delivery, and his small feet, than aught else, and was sorry the Court would not enlarge his time for an exhibition of his prowess in the photographic art. It was to have been a "side show," I suppose, since there is nothing relating to his exploits hinted at, in the most remote degree in the record. Yet this attempted introduction of his own testimony in the case, is quite in keeping with much that appears in the briefs. The statements are mostly *dehors* the record.

There was really no valid reason for asking the Court to grant the privilege to file another brief, and Mr. Countryman (who fathers the other man's abusive epithets,) knew so at the time. There is nothing new in said brief, save the tirade against Mr. Clarke; bluffs, braggadocio and false statements regarding the testimony.

But, let us look at this Supplemental Brief for a moment.

On the first and second pages it is claimed we were

obliged to show fraud, and this we have done by the testimony of two unimpeached, and unimpeachable witnesses (besides the Exhibits) who though called "spies" so frequently are honest, hardworking gentlemen and the Court below having so found, is this Court inclined to disturb such finding, unless gross mistakes were made? *Scienter* is not necessarily to be shown, but fraud is presumed from the facts, the transactions of the defendant. These transactions are shown on pages 109 and 110, and 179 to 182, of the printed record. The statement in the second section, page 2, of said brief, is certainly in error, as these men were engaged simply to ascertain, etc., (pp. 212, 213 & 140, 141.) Counsel would have been very unwise to have taken the course indicated by my handsome friend. In the next section much is said about the gravamen of our case. Well we have thought that the gravamen of any case was the real cause of complaint, not in the exact language adopted, or made use of in presenting it, yet this modern "Daniel" would have it otherwise. In this section he makes use of the word "spies" applying it to the witnesses in California, no less than *five* times, while he only refers or mentions "Our Opening Brief," once, which is quite modest, to be sure, because, according to the latest brief, "Our Opening Brief," was a scorcher, and the Court is admonished no less than *seven times*, to give attention particularly to "Our Opening Brief," for therein are laid down the law and the fact.

The grain of truth in this section, is that defendant kept the genuine goods, made by complainant. They always do that. Samuel says, (p. 232): I "naturally tried to sell my own bitters." This in answer to a question by his solicitor. (Vide, Enoch Morgan, vs. Vendover, 43 Fed. R. 420.) The passer of counterfeit money always has the genuine on hand.

The next section, page 6, is evidently intended to convey an erroneous impression upon this Court. The "surprise" was that I had no notice whatever of the motion of the distinguished gentleman, to strike down our proofs. This was in the Martinoni case and the record being produced, was examined by the Court, and I also looked at the depositions, the certificate of the Examiner, and signature of the witnesses, and the Court promptly overruled his motion. My surprise was simply that I had received *no notice* as provided for by Equity Rules, 3 & 4.

Had we received such notice, we could have asked to amend in any particular where it might be required. But, we have cited authorities in "Our Opening Brief." (If this is to be the manner of designation.) This is not a very nice trick in my handsome young friend, and if he follows this semetic practice, he will be sure to learn the truth of the saying regarding the roosting of chickens. He well knows he refused to acknowledge the receipt of all notices, and thus requiring us to go to the expense of proving service. He well knows also, that he never, by word,

deed or act, gave the first intimation that he would appear at Pittsburgh and cross-examine, and that he successfully contested our intention to take the proofs in New York, under notice, so as to be able to question the witnesses to a greater extent than where the depositions are taken by interrogatories, as was done. He knew we would be handicapped by that smart trick. The errors, if any, of the Examiner, are of but little moment. The witnesses read their depositions, signed them and that the questions and answers are unobjectionable in form, reasonable and true, must be apparent. But he contends the appellee does not own the plant. I think the appellant would like to swindle them out of it, if he could do so. At pp. 10, 11, we have the law laid down, all that did not appear in "Our Opening Brief," and it strikes me that he might have refrained from citing refusal of trade-mark cases, as against the appellee, where the real reasons were that the article had enjoyed the great privilege of a patent for a number of years, and it was then sought to be perpetrated under the guise of a trade-mark. Now, is not one, or the other of these gentlemen(?) who charge all manner of fraud upon "Mr. Clarke," just a trifle afraid the Court, over which they seem to have appointed themselves, one or both of them, with several others perhaps, a protectorate, might obtain an idea that they were engaged in a "flagrant attempt to impose upon" said Court? And are they not trying to hood-wink the Court, when they make

statements which are not sustained by any proofs whatever? Or when they make statements where the proofs to the contrary are overwhelming? What mean they, when they state, page 39, of their brief, (or Gardiner's,) that the formula "is already known to all drug dealers and liquor men"? They stated the same in their answer, (p. 23, of record) in substance, yet not an iota of evidence to prove this bald assertion did any of these defendants introduce. They tried very hard indeed to draw some information regarding this formula, from *our* witnesses, yet signally failed. Why did they not put some of these drug and liquor men on the stand? Now they have the gall to assert that it is proved. Page 14, there is another statement which in their *soi disant* position of the Court's protectorate, they should as well have left out since it bears no weight, and is supremely ridiculous. The idea that "We proved" a wineglass should or does contain, or hold four ounces, is absurd, and if any member of this Court is in doubt, why they can easily take a look at the pharmacopia, in any drug store, or ask any druggist. Then it must be remembered, that neither the appellant nor any of the other defendants in any of the eight cases, produced one single instance of any hurtful effects produced by taking the Hostetter Bitters. The young lawyer who was persuaded to take overdoses, so as to appear as "a terrible example," was only made sleepy. Being a tonic and stimulant it was imprudent to take so much at a time. The quantity

taken by this only witness they pretend to produce, was this poor tool, and he took enough to last him a week, as much as he should have taken during that time. If one obtains ten 3-grain quinine pills, will he take them all within an hour?

Is it right for these distinguished protectorates to cite and quote something said by one Doctor Herman in "Diseases of Women"? Is that authority? It is not mentioned in any of the cases I ever heard of. I should like to cross-examine that man, and would have a perfect right to, before his sayings can be introduced as either law, or fact, in this case. Are not these protectionists seeking to deceive the Court? They make so many assertions which are not supported by the proofs. They quote, or pretend to quote from something not in evidence at all, to-wit, an almanac for 1901, which does not appear in the record. They, (or rather he, for I do not think Mr. Countryman the author,) on page 36, deliberately charges the physicians in New York, with having been bribed. This is the most insulting of all, and if the Mr. Gardiner will meet me in New York, it will give me pleasure to introduce him to any, or to all these gentlemen. Does this man imagine he can sway this Court by the invectives aimed at those who are his peers in all, save egotism? On page 37, there appears a driveling whine, because appellee did not question its witnesses upon something else besides Hostetter's Bitters. Appellee formulated the questions, submitted them to appellant,

and cross-questions were written, and then they were answered by the several witnesses. This was done at the instigation of appellant's handsome solicitor. He would have it done no other way, and now he howls and laments that he did not ask his questions in a different manner, or appear and question them. He squirms (38) for something he did not reach. He imagines that because alcohol is required as a menstruum in compounding the bitters, then it is all alcohol. How ignorant the man is. They fume because appellee did not go to other places, upon the motto that "misery loves company," I suppose. Enough were prosecuted to stop the sales of the bogus bitters, for the present, at least, though there was sufficient evidence adduced to warrant many other suits. He complains we let the drug stores alone. As a general rule druggists sell only by packages; all proprietary medicines, including Hostetter's Bitters. Liquor stores sell (if wholesale) to those they deem, or who are by them taken to be retailers, by the gallon, furnish the second hand bottles, and thus is started the most dastardly trade imaginable. Naturally a person having heard, or read of Hostetter's Bitters, goes to the saloon, asks for it, and if given the bogus stuff, at once proceeds to damn it. He wants to sample the article before making purchase of a whole bottle, or a case, to take home. Appellant's bitters, although looking like the appellee's, are not the same, and have not the same medicinal virtues. The harm is that the

genuine are given the injurious reputation. The plea that the acts of appellant are of but small moment; that the sales of this impure stuff are small, seems strange indeed. Why did they not allow the bill to be taken *pro confesso*, and so save expense? No, they would fight it to the bitter end, and if they could knock out the Hostetters, then they could sell all the bitters they liked. (Personally, I may be permitted to state, that my experience has been that those with whom I have remonstrated, and tried to persuade them to quit selling the imitation, or bogus bitters, have treated me with a courtesy about equal to that shown by Mr. Gardiner; that is to say, extremely insulting, so that I prefer to deal with them through the courts.) On page 48, is a singular statement. This man intimates that I, or my colleague, refused a certain request for a stipulation. It is not said a request therefor was made. In fact nothing was said about the matter. All the cases had been finally settled and the cost paid, leaving the Samuel case to the last. Mr. Countryman sent a young man to me at the Occidental to say that unless I would agree to a stipend, (I forget the exact sum,) he would appeal. My reply was, all right then, he can appeal. Why can a man have the hardihood to write and print such a mean and contemptible statement, charging me with being discourteous. His own student will tell him what a mistake(?) he has made.

Appellant pays a heavy tax to the Government. Until recently, a war tax. All the cologne spirits

used, the Peruvian bark, and a lot of other imported articles, pay a duty, so that the bitters are taxed to as full extent as may be. Appellant would have the Court believe, (p. 41) that Appellee escaped from this duty. Another *mistake* they have made. The bitters are sold far more to the Druggists than to others, and I obtained injunctions against two of the largest wholesale drug houses in the Northwest, at Milwaukee, before Judge Seeman, for selling Hostetter's Bitters by the gallon. They were like Samuels.

Page 31, "reading between the lines" of our witnesses there spoken of. (It sounds like Gardiner). All Appellee's testimony is worthless, to be sure, in the opinion of this loose-tongued Solicitor. Suppose we indulge in "reading between the lines." We see, first, a *contingent fee.* Then a share, or a block of stock in a corporation to make Hostetter's Bitters, if they (C. & G.) are successful. Then we see, or read, that the man who is quoted on page 48 is deeply interested in a financial way. Probably he has a large stock of the bogus bitters, still on hand, and is mighty anxious to get rid of the stuff. Afraid to ship up to the mines, because the Appellee's agents are still around, hunting out the rascals. By what right had they to quote this man? Who was it? Martinoni, Levy, Ahrens, Marisch, or who? This is no part of the record. I can read further. This Mr. Gardiner, being angered at my compliments (?) came into Court, and sat there, dark and glum. He had filed in the Court below a most insulting brief, without

the least provocation, further than that just alluded to, and I had answered it. The answer was not as mild as he wanted. I had failed to bow down and accept his *ipse dixit*, and he sought revenge. "Sweet is revenge", etc. Mr. Countryman was quite reasonable and respectful, in his "Opener", and so it is, still reading between the lines, I can not for a moment think he is the author of the "Supplemental Brief". He does not brag, as does Gardiner, (p. 51). Nor does he get down in the dust, cringe and beg for a decision reversing the Court below. Gardiner's brief is not logical. He pretends, and tries to make the Court believe that Hostetter's Bitters are the most injurious, health and life destroying concoction imaginable, and yet he contends that Appellant should have the uninterrupted privilege of making and selling them, to the innocent, poor deluded people, for whom he is shedding so many tears. "Consistency is a jewel" he knows not of.

In this man's intense egotism, he deemed it strange Appellee did not take the depositions in San Francisco, instead of in New York. It would have been so nice for him, or the whole raft of them, to have had the witnesses brought there, and they could all have had such a prolonged time, cross-examining them.

The plaint that Appellee's counsel has been discourteous, comes with poor grace from a man who absolutely refused to even acknowledge service of a notice, but preferred to compel service to be proved

by affidavit. And from a man who absolutely refused Mr. Galbreth the smallest sample possible of what it was claimed was bitters, made by the Hostetter Co. I do not now, and I never did believe, it was Hostetter's bitters, since the alcohol therein was far in excess of that in the genuine bitters. His discourteous refusal was convincing, anyhow.

Respectfully submitted,

ALBERT H. CLARKE,

Solicitor and of Counsel for Appellee.

No. 788.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

SAMUEL BROS. AND COMPANY,
a corporation,
Appellant,

vs.

THE HOSTETTER COMPANY,
a corporation,
Appellee.

Petition for Rehearing.

R. H. COUNTRYMAN,
Solicitor for Appellant.

PERNAU PRESS 543 CLAY ST.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUEL BROS. AND COMPANY (a corporation), Appellant, vs. THE HOSTETTER COMPANY (a corporation), Appellee.	No. 788

PETITION FOR RE-HEARING.

The appellant earnestly requests a hearing herein.

The appellant herein is engaged in transacting a large business. It has a large capital invested, and has offices in San Francisco, and in the city of New York.

Looking through its corporate entity to ascertain the personality behind, we find men of the highest business standing in San Francisco. We challenge criticism as to the standing of any member of the corporation. The president of appellant, Mr. Moses Samuel, has for many

years occupied a position of trust and responsibility with one of the large Hebrew congregations of San Francisco, and his name as a business man and philanthropist stood without blemish until the decree of the Honorable Circuit Court.

This cause was tried with a number of others, in none of which was any appeal taken, and feeling that the distinguished Circuit Judge had reached an erroneous conclusion by reason of the association from the consolidation of the causes, the appellant took the only course open to it, that of appealing to this Honorable Court.

Pending the appeal, the appellee tended offers of settlement, which the appellant refused, stating that it was not a matter of money, but something which was higher than money, good reputation, and that, therefore, any mere waiving of financial responsibility was not of consideration to appellant. That such is true, is proven by the expense undergone by appellant, appearing as it does from the record that the amount of bitters appellant sold was about ($70.00) seventy dollars per year, invoice price (p. 225).

One of the difficulties in equity cases with which we all have to labor is the failure of the Court to see the witnesses, and observe their manner of testifying. Certainly, if the Court could have observed the two witnesses Morrison and McEwers, it would have agreed with the opinion of Judge Baldwin, in which Judge Field concurred, in *Blankman* vs. *Vallejo*, 15 Cal. 645, that the credulity of a Court does not necessarily correspond with the vigor and positiveness with which a

witness swears, and that the Court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements.

It is difficult to photograph the scene of the taking of the deposition of the witness in an equity case. We call the Court's attention to pages 146–154 of the testimony relative to the notes, claimed to have been made by the two witnesses, of the interview between them and the salesman of appellant. It should be remembered that these witnesses had testified in a number of other cases, that there was a remarkable similarity of alleged statements made by salesman to them, and that they were carefully coached through the taking of the testimony. In this particular case, the writer happening to go from the room when Mr. Morrison was testifying found Mr. McEwers in a space partitioned off, carefully listening to the testimony of Morrison, with such evident purpose that comment is superfluous. The testimony was taken in the Parrott Building, over what is known as the "Emporium", in San Francisco.

With reference to these particular notes, after strenuous objection being made to their production by appellee's solicitor, and finally after said solicitor *reminded* the witness that he had the right to see the notes, and from such *reminder* the witness obtained their possession, that before the witness could be asked another question, said solicitor changed his position, and informed the witness that if he so desired he could answer without examining his notes (p. 148).

The subsequent questions and answers and colloquy in the record show beyond controversy that the witness had examined the portion of the notes about which he was being cross examined, that he had removed the first page of the notes so as to see what was contained on the second page, which contents were the subject of his cross examination, and that everybody present in the room were advised and knew that the witness had examined the said notes. It is always unpleasant for a lawyer to criticize his opponent, and particularly so when the criticising lawyer is on the losing side of the litigation. However, we invite the attention of the Court to the record which somewhat obscurely photographs the scene.

Again consider the taking of the depositions, conceding all that has been said in the opinion of the learned Circuit Judge, who was the author of the opinion, the Court has overlooked the fact that the statements contained in the certificate are untrue. The depositions were not only taken in this case, but taken in other cases at the same instant of time, a charge was made against each of the defendants, based upon the theory that the deposition was taken in a regular way in each case, yet an examination of the depositions show that they were purely carbon copies and there is no testimony for the inference drawn in the opinion that the witness had read over his deposition taken on a former occasion, and that such deposition was for convenience used in this particular instance, rather than depositions given in some of the other litigation pending in other jurisdictions.

Consider again the foundation of appellee's alleged title. It does not favorably strike the moral sense for the administrator of an estate to sell to a corporation, of which he is president, he acting as the representative of the buyer and seller, and thus obtain property, which is claimed to be worth millions by a payment of NINE THOUSAND ($9000.00) DOLLARS in cash and an agreement to pay the further sum of EIGHTY ONE THOUSAND ($81,000.00) DOLLARS on demand (pages 543, 544 and 545).

Again the appellee is defrauding the U. S. government out of large revenues by selling an alcoholic stimulant as a medicine.

The Court assumes that the allegation of our answer, that we could neither admit nor deny the allegations of the bill of complaint relative to the corporate existence of the appellee, is subject to criticism.

All the precedents are in favor of the form of denial made by us, and reason and the history of Courts of Equity would seem to warrant the form we used.

We had no way of ascertaining the corporate existence of the appellee and to have denied it flatly would have shown a willingness to make statements without due knowledge, which we think is not commendable, and we therefore adopted the precedent laid down by every writer on equity pleading and procedure, which has come under our observation.

We did not follow the code form of denial, but adopted the form used in Courts of Equity from past ages. The purpose of purging the conscience of the defendant is manifest in equity pleadings, but not to

compel the admission of an allegation without the knowledge or information of the defendant, or to make a positive denial of an allegation that might be true.

We have somewhat lengthfully considered the case in our briefs, and we do not consider it necessary to take up the various propositions therein discussed in a petition for re-hearing, believing as we do, that the Court will as carefully consider those positions as though they were re-stated in this petition.

It may be difficult for the Court to place itself in our position but it is certainly disheartening to a lawyer to maintain the high standing and morality of his profession, when he sees crude, clumsy perversions of fact successful before a tribunal of such high character and recognized ability as a United States Circuit Court of Appeals.

We hear that it is easy to simulate suits in equity for the purposes of obtaining decisions to be used in another jurisdiction and that such things are done, or attempted to be done, even in patent cases, where the witnesses are present before the Judge in open Court, but it is hard to believe that experienced jurists are so easily deceived, and yet when a litigant of high respectability, who has conducted himself according to ideal planes of fair dealing and business morality, finds his reputation sworn away in a loose manner by irresponsible persons, paid for the purpose of obtaining testimony, he feels that a good reputation and a high character are of but little substantial value.

Respectfully submitted,

R. H. COUNTRYMAN,
Solicitor for Appellant.

I hereby certify that the foregoing petition for rehearing is in my opinion well founded in point of law and that it is not interposed for delay.

R. H. COUNTRYMAN,
Solicitor for Appellant.

No. 788.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUEL BROS. & COMPANY (a corporation),
Appellant,
vs.
THE HOSTETTER COMPANY (a corporation),
Appellee.

Supplemental Petition for Rehearing.

R. H. COUNTRYMAN,
Solicitor for Appellant.

PERNAU PRESS, 543 CLAY ST., S. F.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

SAMUEL BROS. & COMPANY (a corporation), Appellant, vs. THE HOSTETTER COMPANY (a corporation), Appellee.	No. 788.

Supplemental Petition for Re-Hearing.

To the Honorable the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit.

Samuel Bros. & Company, a corporation, appellant in the above entitled suit, respectfully calls the Court's attention to the decision of the Supreme Court of the United States, in the case of *Clinton E. Worden & Company*, petitioner, against the *California Fig Syrup Company*, respondent, opinion filed January 5th, 1903, and numbered 36 on the October term of 1902, in which that distinguished tribunal says:

" The Courts below concluded, upon the evidence, " that the defendants sold a medical preparation named, " marked and placed, in imitation of the complainant's

" medicine, for the purpose and with the design and " intent of deceiving purchasers and inducing them to " buy defendant's preparation instead of the complain- " ant's. We see no reason to dissent from that conclu- " sion, and if there were no other questions in the case, " we should be ready to affirm the decree, awarding a " perpetual injunction and an account of the profits " and gains derived from such unfair and dishonest " practices.

" Another ground, however, is urged against the " complainant's right to invoke the aid of a Court of " equity, in that the California Fig Syrup Company, " the complainant, has so fraudulently represented to " the public the nature of its medical preparation that " it is not entitled to equitable relief.

" Some Courts have gone so far as to hold that Courts " of equity will not interfere by injunction in contro- " versies between rival manufacturers and dealers in so- " called quack medicines (*Fowle* v. *Spear*, Circuit Court " of the United States for the Eastern District of Penn- " sylvania, Pennsylvania Law Journal, vol. 7, p. 176; " *Heath* v. *Wright*, 3 Wall. Jr. 141; *Fetridge* v. *Wells*, " 4 Abb. Pr. 144).

" It may be said, in support of such a view, that " most, if not all, the states of this Union have enact- " ments forbidding and making penal the practice of " medicine by persons who have not gone through a " course of appropriate study, and obtained a license " from a board of examiners; and there is similar legis- " lation in respect to pharmacists. And it would seem " to be inconsistent, and to tend to defeat such salutary

" laws, if medical preparations, often and usually con-
" taining powerful and poisonous drugs, are permitted
" to be widely advertised and sold to all who are willing
" to purchase. Laws might properly be passed limit-
" ing and controlling such traffic by restraining retail
" dealers from selling such medical preparations, except
" when prescribed by regular medical practitioners.

" But we think that, in the absence of such legisla-
" tion, Courts cannot declare dealing in such prepara-
" tions to be illegal, nor the articles themselves to be
" not entitled, as property, to the protection of the law.

" We find, however, more solidity in the contention,
" on behalf of the appellants, that when the owner of a
" trade mark applies for an injunction to restrain the
" defendant from injuring his property by making false
" representations to the public, it is essential that the
" plaintiff should not in his trade mark, or in his adver-
" tisements and business, be himself guilty of any false
" or misleading representation; that if the plaintiff
" makes any material false statement in connection
" with the property which he seeks to protect, he loses
" his right to claim the assistance of a Court of equity;
" that where any symbol or label claimed as a trade
" mark is so constructed or worded as to make or con-
" tain a distinct assertion which is false, no property
" can be claimed on it, or, in other words, the right to
" the exclusive use of it cannot be maintained."

In the suit in which this petitioner is appellant, the original transcript was filed on December 30th, 1901, the printed transcript of two volumes was filed February 15th, 1902. Appellant's brief was filed March 3, 1902.

Appellee's brief was filed March 11, 1902. The case was argued March 12, 1902. Appellant's supplemental brief was filed March 27, 1902. Appellee's supplemental brief was filed April 21, 1902. The opinion was filed October 6, 1902. The petition for re-hearing was filed November 20th, 1902.

By reason of the somewhat voluminous record and written arguments before the Court, we hesitate about considering at any length the application of the decision of *the California Fig Syrup case* to our case.

The testimony in our case demonstrates that Hostetter's preparation is a quack medicine. That it is simply an alcoholic stimulant corresponding to an elaborate whiskey cocktail, containing more ingredients than the drink commonly known by that name (page 340).

That it is contra-indicated by all reputable medical authors and physicians in the diseases which it is advertised to cure. That in many of said diseases it would prove fatal to the patient. That taken in the manner prescribed on the labels, and in the almanacs and other advertising matter of appellee, it would result in chronic alcoholism. That the quantity prescribed to be taken before each meal, to-wit, one wine glass full, is an amount largely in excess of what would be taken by an ordinarily healthy man at one time in a social drink or as an "appetizer". That the quantity prescribed if taken by a woman afflicted with any of the diseases it is advertised to cure would be exceedingly injurious to her disorders, and create an alcoholic taste that would inevitably prove detrimental to her moral and social standing.

We all recognize that in modern society the indulgence in alcohol by men is decreasing, and that its indulgence by women is increasing. That the man who has a tendency towards excess in alcoholic stimulants loses social caste. That men no longer drink heavy Port or old Madeira. That it is not fashionable for men to drink to excess. That the spirit of *bon comradarie* is leading fashionable women to the consumption of a larger quantity of alcoholic stimulants than is beneficial for their highly emotional natures.

There cannot be two opinions on the subject of appellee's preparation being a fraud on the public. It is recommended to the male and the female, particularly to the female. Appellee advertises it as "a mild and safe invigorant and corroborant for delicate females", and also recommends that "persons in a debilitated state should commence by taking small doses and increase with their strength". Appellee evidently means the strength of the appetite, and not the strength of the patient's physique, for there is no medical work published but that states in unqualified terms that alcohol should be avoided by dyspeptics and persons afflicted with liver trouble. Indeed, we do not need scientific authority on this point; it is well understood by every person of mature years.

Man is a free moral agent, and may consume such liquors as his judgment or position in society may dictate, but there is much reason in the opinion of Mr. Justice Shiras that laws might properly be passed limiting and controlling the traffic by retail dealers of medical preparations, except when prescribed by regular

medical practitioners. This is unquestionably true when an alcoholic stimulant in the guise of a medicine is introduced into a man's home to sap the morality of the female members of his family, and to destroy the virility of his children. Such commercialism shocks the conscience of any thinking man. We all recognize that a drunken man is disagreeable, while a drunken woman is abhorrent. All the graces of a woman's mind and body are destroyed when the alcoholic habit overcomes her strength, and we think it the duty of a Court of Equity, clothed as it were with the attributes of God himself to examine and purge the minds and consciences of men, to emphatically stamp its disapproval upon the nefarious practice of ruining the morals and health of American manhood and American womanhood under the guise and cloak of a medical preparation guaranteed to cure the very ills which it aggravates.

We respectfully submit that under the decision of the United States Supreme Court in the *Fig Syrup case*, the petition for a rehearing herein should be granted.

R. H. COUNTRYMAN,
Solicitor for Appellant.

IN THE

United States Circuit Court of Appeals,

FOR THE

NINTH CIRCUIT.

No. 788.

SAMUEL BROTHERS AND COMPANY, a Corporation, Appellant,

vs.

THE HOSTETTER COMPANY, a Corporation, Appellee.

Remonstrance to Appellant's Petition for Rehearing.

A. H. CLARKE,
E. E. GALBRETH,
Solicitors for Appellee.

Smith Bros., Franklin Print, 405 Grant Street, Pittsburg.

IN THE

United States Circuit Court of Appeals,

FOR THE

NINTH CIRCUIT.

No. 788.

SAMUEL BROTHERS AND COMPANY, a Corporation,
Appellant,
vs.
THE HOSTETTER COMPANY,
a Corporation, Appellee.

Remonstrance to Appellant's Petition for Rehearing.

To the Honorable, the Judges of said Court:

Appellee remonstrates against the granting of said petition for the following reasons:

It is not founded upon any newly discovered evidence.

In the Court below, and also in this Court, the case was fully argued, and by appellant's counsel to that extent that he occupied more than the time allowed, and had to be called down.

There is no new matter disclosed in the petition other than dwelt upon in the petitioner's briefs and arguments, save that petitioner is a Hebrew, (which may be inferred from his name), and that there was some talk of a com-

promise, neither of which, it would seem, are of much moment, one way or the other.

When the appeal was taken the case was before the Master for the assessment of the damages, and the call by complainant upon defendant for production of books and accounts, may possibly have had some effect in accelerating said appeal, since it may have been shown that far greater sales were made than stated in said petition.

The statement that appellee "tendered offers of settlement" is untrue; yet had it occurred, what reason would that be for a rehearing of this case? We have yet to learn that any offer of compromise in a suit pending can be made use of by either party.

The statement that "appellee is defrauding the U. S. Government" is too absurd for comment. Why does not the distinguished Mr. Countryman, or Gardner, appear before a grand jury and have appellee indicted?

By Mr. Galbreth:

This cause was tried with a number of others, and we feel that the distinguished Circuit Judge reached a just, legal and equitable conclusion, for of all the causes then tried, none showed more facts of flagrant disregard of the rights of appellee, or a more brazen transgression in the field of "unfair competition" than does this cause.

Certainly, if the Court could have observed these two witnesses, Morrison and McEvers, while they were giving their testimony on behalf of appellee, they would have agreed that there were two conscientious witnesses, who endeavored and succeeded in telling the truth, the whole truth and nothing but the truth; and these two witnesses gave their testimony with the knowledge that appellent, through its counsel, had repeatedly declared and threatened, before any testimony in the cause had been given, that if any witnesses testified to facts which would support

the allegations of the Bill of Complaint filed in the action, they would be promptly prosecuted for perjury; yet these two witnesses, with such knowledge, as truthful and honorable citizens, which they were and are, ignored the threats against them, and carefully and truthfully narrated the facts of the transactions of the sales and the conversations; and furthermore, each of these witnesses is the peer in character of any officer, or the counsel of appellant, and we feel quite sure neither of them could be induced to carry into litigation a threat which, apparently has for its object the determent or intimidation of witnesses in the matter of giving their testimony to be used in a cause pending in a court of justice. It is always unpleasant for a lawyer to criticise his opponent. Appellant complains of this prosecution because, as counsel for appellant says, "the amount of bitters appellant sold was about ($70.00); seventy dollars per year." The greatest damage done to appellee is the putting on the market, as and for "Hostetter Bitters," a cheap, miserable concoction, which educates the public into the belief that appellee's goods are not a good, helpful, medicinal preparation, but is harmful, while the fact is, the genuine goods are conclusively proved to be helpful and not harmful to the consumers thereof.

There is so much stated in appellant's petition for rehearing which is *dehors the record*: and seems so childish, that it is hard for one to believe that a lawyer ever consented to endorse the statements contained therein.

Appellant had a fair trial, and was given an attentive and patient hearing, by both the lower court and this honorable court, and should be satisfied, and quietly submit to the impartial and just judgment of two competent and able courts, and not continue to act, like a spoiled child which has been forbidden entrance to the room, stand outside and kick the door.

The findings of fact and the conclusions of law in this case are surely correct and sound.

Respectfully submitted,

A. H. Clark,
E. E. Galbreth,
Solicitors for Appellee.

Pittsburgh, January 2, 1903.

No. 787

IN THE

UNITED STATES CIRCUIT COURT OF APPEAL

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
E. F. WILLCOX,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circ
Court for the Southern District of California.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME ST., S. F.

INDEX.

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Southern District of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you between the United States of America, plaintiffs, and E. F. Willcox, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, the United States of America, as by their complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the twenty-fourth day of December, next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals, may cause further to be done therein to correct

that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 26th day of November, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States, the one hundred and twenty-sixth.

[Seal] WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

By Chas. N. Williams,

Deputy Clerk.

The above writ of error is hereby allowed.

OLIN WELLBORN,

Judge.

I hereby certify that a copy of the within writ of error was on the 26th day of November, 1901, lodged in the clerk's office of the said United States Circuit Court for the Southern District of California, for the said defendants in error.

WM. M. VAN DYKE,

Clerk United States Circuit Court, Southern District of California.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: United States Circuit Court of Appeals, for the Ninth Circuit. The United States of America, Plaintiffs in Error, vs. E. F. Willcox, Defendant in Error. Writ of Error. Filed November 26, 1901. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to E. F. Willcox, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 24th day of December, A. D. 1901, pursuant to a writ of error on file in the clerk's office of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, in that certain action number 5, Northern Division, wherein the United States of America, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said United States of America, in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable OLIN WELLBORN, United States District Judge, for the Southern District of California, and one of the Judges of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, this 26th day of November, A. D. 1901, and of the Independence of the United States, the one hundred and twenty-sixth.

OLIN WELLBORN,

United States District Judge for the Southern District of California.

United States of America, }
Northern District of Cal. } ss.

I hereby certify and return that I served the annexed writ of citation on the therein-named E. F. Willcox, by handing to and leaving a true and correct copy thereof with said E. F. Willcox, personally, at San Francisco, in said District, on the 4th day of December, A. D. 1901.

JOHN H. SHINE,
United States Marshal.
By R. De Lancie,
Office Deputy.

Service of the within citation and receipt of a copy thereof admitted this —— day of November, A. D. 1901.

_____,
Solicitor for Defendant in Error and Defendant in the Court Below.

[Endorsed]: Original. Marshal's Docket No. 2,169. In the United States Circuit Court of Appeals, for the Ninth Circuit. The United States of America, Plaintiffs in Error, vs. E. F. Willcox, Defendant in Error. Citation. Filed December 6, 1901. Wm. M. Van Dyke, Clerk.

The answer of the Judges of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

The record and all proceedings of the complaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Circuit

Court, to the United States Circuit Court of Appeals, for the Ninth Circuit, in a certain schedule to this writ annexed, as within we are commanded.

By the Court.

[Seal] WM. M. VAN DYKE,
Clerk.

In the Circuit Court of the United States, Southern District of California, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff.

vs.

E. F. WILLCOX,
Defendant.

Complaint.

The United States of America, by Frank P. Flint, United States Attorney for the Southern District of California, files this day its complaint against E. F. Willcox, the above-named defendant, and for cause of action alleges:

That said defendant, heretofore, to wit, on the 14th day of December in the year of our Lord one thousand eight hundred and ninety-six, was a first lieutenant in the Sixth Regiment of Cavalry of the said United States.

That said defendant, heretofore, to wit, on the —— day of ————, in the year of our Lord one thousand eight hundred and ————, as such lieutenant, did ren-

der his account to the United States in the sum of two hundred ($200) dollars, as and for the value of a certain horse then and there claimed by said defendant to have been lost in the military service of the United States, at Fort Lewis, in the State of Colorado, on or about the 6th day of April, A. D. 1889. Which said account was duly presented to the War Department; and claim numbered 108,188. That afterward, to wit, on the 7th day of December, 1896, said account was duly settled by the Auditor of the War Department, and a certificate of settlement numbered 1,737, duly issued by the said Auditor of the War Department, for the said sum of $200.00; which sum of $200.00 was paid to said defendant on or about the 14th day of December, 1896.

That on the 28th day of May, 1897, the Comptroller of the Treasury directed a revision of said claim number 108,188, upon which said aforementiond certificate of settlement number 1,737 was based, and by reason of which said defendant received from plaintiff said sum of $200.00, and disallowed said claim of defendant, for the reason that the loss of the said horse on which the said claim of defendant was based, was not without fault on the part of said defendant; and the said defendant by his negligence contributed to the loss of said horse, and thereby was not entitled to recover for said loss, under the act of March 3, 1885 (23 Stat. at Large, p. 350).

That thereafter, to wit, on the 24th day of May, A. D. 1898, acting on the direction of the Comptroller of the Treasury, the Auditor of the War Department, at

Washington, D. C., re-stated said claim of defendant and issued a new certificate number 4,867, raising a charge of two hundred ($200.00) dollars against said defendant; by reason of which said defendant became then and there indebted to plaintiff in the sum of $200.00.

That the said defendant, though often demanded, has neglected and refused and still neglects and refuses, to pay said sum of $200.00, or any part thereof, and the whole of said sum of $200.00 remains due and unpaid, together with interest thereon at the rate of six per cent per annum from said 24th day of May, 1898.

Wherefore, plaintiff brings suit and demands judgment against said defendant for said sum of $200.00, with interest thereon at the rate of six per cent per annum from the 24th day of May, 1898, until entry of judgment; together with costs of suit.

FRANK P. FLINT,
United States Attorney.

[Endorsed]: Form 354. No. 5. U. S. Circuit Court, Southern District of California, Northern Division. United States of America vs. E. F. Willcox. Complaint. Filed Aug. 8, 1900. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

E. F. WILLCOX,
Defendant.

Action brought in the said Circuit Court, and the complaint filed in the office of the Clerk of said Circuit Court, in the City of Los Angeles, County of Los Angeles.

Summons.

The President of the United States of America, Greeting, to E. F. Willcox.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city of Los Angeles county of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover judgment against said defendant for the sum of $200.00 with interest thereon from the 24th day of May, 1898, until entry of judgment, together with costs of suit because as plaintiffs allege defendant as First Lieutenant in the Sixth Regiment of Cavalry, of the United States did render his account to the United States, in the sum of $200.00, as and for the value of a certain horse then and there claimed by said defendant to have been lost in the military service of the United States, at Fort Lewis, in the State of Colorado, on or about the 6th day of April, A. D. 1889, which said account was duly presented to the War Department, that afterward said account was duly settled, and a certificate of settlement issued by the Auditor of the War Department, and said sum of $200.00 was paid to defendant on or about the 14th day of December 1896, that on the 28th day of May, 1897, the Comptroller of the Treasury directed a revision of said claim by reason of which said defendant received from plaintiffs said sum of $200.00, and disallowed said claim of defendant, for the reason that the loss of said horse on which said claim of defendant was based, was not without fault on the part of said defendant; and the said defendant by his negligence contributed to the loss of said horse, and thereby was not entitled to recover for said loss, that thereafter, to wit, on the 24th day of May, A. D. 1898, the Auditor of the War Department re-stated said claim of defendant, and issued a new certificate raising a charge of $200.00 against said defendant; by reason of which said defendant became then and there

indebted to plaintiffs in the sum of $200.00, that said defendant though often demanded, has neglected and refused, and still neglects and refuses to pay said sum of $200.00, or any part thereof, and the whole of said sum remains due and unpaid together with interest thereon at the rate of six per cent per annum from said 24th day of May, 1898, all of which more fully appears from the complaint on file in this cause, to which you are hereby expressly referred, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the Court for the relief demanded in the complaint.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 10th day of August, in the year of our Lord one thousand nine hundred and of our Independence the one hundred and twenty-fifth.

[Seal] WM. M. VAN DYKE,
Clerk.
By Chas. N. Williams,
Deputy Clerk.

United States Marshal's Office,
Southern District of California.

I hereby certify, that I received the within writ on the 27th day of August, 1900, and personally served the same on the 1st day of September, 1900, by delivering to and leaving with E. F. Willcox, said defendant named therein, personally, at the county of Mariposa in said District a certified copy thereof together with a copy of

the complaint, certified to by Wm. M. Van Dyke, clerk, etc., attached thereto.

Los Angeles, Sept. 7th, 1900.

H. Z. OSBORNE,
United States Marshal.
By H. T. Christian,
Deputy.

[Endorsed]: No. 5. U. S. Circuit Court, Ninth Circuit, Southern District of California, Northern Division. United States of America vs. E. F. Willcox. Summons. Frank P. Flint, Esq., Plaintiff's Attorney. Filed September 7, 1900. Wm. M. Van Dyke, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

E. F. WILLCOX,
Defendant.

Demurrer.

Comes now the defendant in this action and assigns the following cause of demurrer, viz., i. e., the complaint in this action does not set forth facts which constitute a cause of action. Wherefore defendant prays that he may have judgment against plaintiffs for his costs.

E. F. WILLCOX,
Defendant, in Propria Persona.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

H. Z. AUSTIN,

Counsel for Defendant. (Address.) Fresno, Cal.

[Endorsed]: No. 5. In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division. The United States vs. E. F. Willcox. Demurrer. Filed October 9, 1900. Wm. M. Van Dyke, Clerk.

At a stated term, to wit, the May Term, A. D. 1901, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Northern Division, held at the courtroom in the city of Fresno, on Tuesday, the fourteenth day of May, in the year of our Lord one thousand nine hundred and one. Present: The Honorable OLIN WELLBORN, District Judge.

UNITED STATES OF AMERICA, Plaintiffs,
vs. No. 5.
E. F. WILLCOX, Defendant.

Order Sustaining Demurrer and Dismissing Action.

This cause having heretofore been submitted to the Court for its consideration and decision on the demurrer of the defendant to plaintiff's complaint, and the Court having duly considered the same, and being fully advised

in the premises, it is now, on this 14th day of May, 1901, being a day in the May Term, A. D. 1901, of said Circuit Court of the United States for the Southern District of California, Northern Division, ordered that said demurrer be, and the same hereby is, sustained, and that said action be dismissed.

[Endorsed]: No. 5. U. S. Circuit Court, Southern District of California, Northern Division. United States of America vs. E. F. Willcox. Copy of Order Sustaining Demurrer and Dismissing Action. Filed May 31, 1901. Wm. M. Van Dyke, Clerk.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Northern Division.

UNITED STATES OF AMERICA,
Plaintiffs,
vs.
No. 5.

E. F. WILLCOX,
Defendant.

Judgment.

This cause having heretofore been submitted to the Court for its consideration and decision upon the demurrer of defendant to the complaint of plaintiff, and the Court having duly considered the same and having on the 14th day of May, 1901, being a day in the May Term, A. D. 1901, of said Circuit Court of the United

States for the Southern District of California, Northern Division, ordered that said demurrer be sustained and that said action be dismissed.

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the United States of America, the plaintiffs herein, take nothing by this action as against the said defendant and that the said defendant E. F. Willcox go hereof without day.

Judgment entered May 31st, 1901.

WM. M. VAN DYKE,
Clerk.

I, Wm. M. Van Dyke, clerk of the Circuit Court of the United States, for the Southern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original judgment made and entered by said Court May 31st, 1901, in the cause entitled United States of America, Plaintiffs, vs. E. F. Willcox, Defendant, No. 5, and remaining of record therein.

Attest my hand and the seal of said Circuit Court this 31st day of May, A. D. 1901.

[Seal] WM. M. VAN DYKE,
Clerk.

[Endorsed]: No. 5. U. S. Circuit Court, Ninth Circuit, Southern District of California, Northern Division. United States of America vs. E. F. Willcox. Certified Copy Judgment. Filed May 31, 1901. Wm. M. Van Dyke, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, Northern Division.

UNITED STATES OF AMERICA,
Plaintiffs,
vs.
E. F. WILLCOX,
Defendant.
No. 5.

Certificate to Judgment-Roll.

I, Wm. M. Van Dyke, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Southern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 31st day of May, A. D. 1901.

[Seal] WM. M. VAN DYKE,
Clerk.

[Endorsed]: No. 5. In the Circuit Court of the United States, Ninth Judicial Circuit, for the Southern District of California, Northern Division. United States of America vs. E. F. Willcox. Judgment-Roll. Filed May 31st, 1901. Wm. M. Van Dyke, Clerk. Recorded Judgment Register Book No. 1, page 2.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
E. F. WILLCOX,
Defendant.

Petition for Writ of Error.

The above-named plaintiff, the United States of America, conceiving itself aggrieved by the judgment entered on the thirty-first day of May, 1901, in the above-entitled cause, hereby prays the Court for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and that a transcript of the records and proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the said Circuit Court of Appeals of the United States for the Ninth Circuit.

Los Angeles, Cal., November 25th, 1901.

L. H. VALENTINE,
United States Attorney, Southern District of California.

[Endorsed]: No. 5. U. S. Circuit Court, Southern District of California, Northern Division. United States of America vs. E. F. Willcox. Petition for Writ of Error. Filed November 25, 1901. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
E. F. WILLCOX,
Defendant in Error.

Assignment of Errors.

Now comes the above-named plaintiff in error, the United States of America, by L. H. Valentine, United States Attorney for the Southern District of California, its counsel, and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

The Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division, erred in sustaining the defendant's demurrer to the plaintiff's complaint.

Wherefore, the said United States of America prays that the judgment of the said Circuit Court of the United States, Southern District of California, Northern Division, be in all things reversed.

L. H. VALENTINE,
United States Attorney for the Southern District of California.

[Endorsed]: No. 5. U. S. Circuit Court of Southern District of California, Northern Division. United States of America vs. E. F. Willcox. Assignment of Errors. Filed November 25, 1901. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

At a stated term, to wit, the July Term, A. D. 1901, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom in the city of Los Angeles, on Monday, the twenty-fifth day of November, in the year of our Lord, one thousand nine hundred and one. Present: The Honorable OLIN WELLBORN, District Judge.

UNITED STATES OF AMERICA, Plaintiffs,		No. 5,
vs.		Northern
E. F. WILLCOX, Defendant.		Division.

Order Allowing Writ of Error.

On reading and filing the petition of plaintiffs, the United States of America, praying for the allowance of a writ of error in the above-entitled cause, returnable before the United States Circuit Court of Appeals for the Ninth Circuit, and on motion of L. H. Valentine, Esq., United States Attorney, of counsel for said plaintiffs, it is ordered that said petition be, and the same hereby is al-

lowed, and granted, and that a writ of error be allowed in said cause returnable before the United States Circuit Court of Appeals, for the Ninth Circuit, on the 24th day of December, 1901, and that a transcript of the record and of the proceedings and papers upon which the judgment in favor of defendant was made and entered in said cause, duly authenticated, be sent to said United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Northern Division.

UNITED STATES OF AMERICA, Plaintiffs,
vs. No. 5.
E. F. WILLCOX, Defendant.

Clerk's Certificate to Transcript.

I, Wm. M. Van Dyke, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing fifteen (15) typewritten pages numbered from 1 to 15, inclusive, and comprised in one volume, to be a full, true, and correct copy of the record, pleadings, papers, assignment of errors, and of all proceedings in the above and therein entitled cause, and that the same together constitute the return of the annexed writ of error.

I do further certify that the cost of the foregoing record is $7.60.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, this 11th day of December, in the year of our Lord, one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-sixth.

[Seal] WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

[Endorsed]: No. 787. In the United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. E. F. Willcox, Defendant in Error. Transcript of Record Upon Writ of Error to the United States Circuit Court for the Southern District of California.

Filed December 21, 1901.

F. D. MONCKTON,

Clerk.

No. 787.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

E. F. WILCOX,
Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR

L. H. VALENTINE, *U. S. Attorney*,
GEORGE L. McKEEBY, *Ass't U. S. Attorney*,
Solicitors for Plaintiff in Error.

Upon Writ of Error to the Circuit Court of the United States for the Southern District of California, in and for the Northern Division.

Kingsley, Moles & Collins, Printers, Los Angeles, Cal.

No. 787

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

E. F. WILCOX,
Defendant in Error.

Brief on Behalf of Plaintiffs in Error.

STATEMENT OF THE CASE.

Lieut. E. F. Wilcox, now Captain Wilcox, filed a claim in the Third Auditor's office (now the office of the Auditor of the Interior Department), on April 25th, 1889, for two hundred dollars the value of a horse belonging to him and alleged to have been killed in the military service of the United States on April 6, 1889. Settlement of the claim was made by the Auditor for the War Department on December 7, 1896. The draft was issued for the amount allowed on December 14, 1897. On May 28, 1897, the Comptroller of the Treasury revised said account, on his own motion, and disallowed the amount which had been allowed by the Auditor, for reasons stated as follows:

"Value of a horse whose leg was broken by a kick of one of the horses in a corral into which the horse was turned. The horse was shot by order of claimant, $200.00. On this case the Quartermaster General reports: 'It was not necessary that the horse should have been turned into a corral with a lot of public horses, where any horse was liable to be hurt as was this one. If the claimant assumed the risk of turning his horse, especially one valued at one thousand dollars, in a corral among a number of Government horses, it is thought the claimant assumed the risk, and that the loss arose not without fault on the part of the claimant.' This is a case of contributory negligence on the part of the claimant, and he is not entitled to recover under the Act of March 3, 1885. 23 Stats. at Large, page 350."

On May 24, 1898, the Auditor for the War Department, by direction of the Comptroller, re-stated said account, and raised the charge of two hundred dollars against the claimant. On August 8, 1900, the United States, by the United States Attorney for the Southern District of California, filed an action at law in the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Northern Division, to recover the two hundred dollars charged against Captain Wilcox. (Record 5.) The defendant demurred to the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action. (Record 11.) The court on the hearing sustained the demurrer and dismissed the case. (Record 12), and thereafter rendered judgment in favor of the defendant. (Record 13.)

SPECIFICATION OF ERRORS.

The Circuit Court of the United States, Ninth Circuit, Southern District of California, Northern Division, erred in sustaining the defendant's demurrer to plaintiff's complaint. (Record 17.)

POINTS AND AUTHORITIES.

THE COMPTROLLER OF THE TREASURY HAD THE AUTHORITY TO RE-STATE THE ACCOUNT AND RAISE THE CHARGE AGAINST THE CLAIMANT, IF DONE WITHIN A YEAR AFTER SETTLEMENT BY THE AUDITOR.

The act of March 3, 1885, (23 Stats. at Large, p. 350,) provides:

"That the proper accounting officers of the treasury be, and they are hereby, authorized and directed to examine into, ascertain, and determine the value of the private property belonging to officers and enlisted men in the military service of the United States which have been, or may hereafter be, lost or destroyed in the military service, under the following circumstances:

"First. When such loss or destruction was without fault or negligence on the part of the claimant.

"Second. * * * *

"Third. Where it appears that the loss or destruction of the private property of the claimant was in consequence of his having given his attention to the saving of the property belonging to the United States which was in danger at the same time and under similar circumstances. And the amount of such loss so ascertained and determined shall be paid out of any money in the treasury not otherwise appropriated, and shall be in full for all such loss or damage: *Provided* That any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be re-opened or considered: *And provided further,* That the liability of the government under this act shall be limited to such articles of personal property as the secretary of war, in his discretion, shall decide to be reasonable, useful, necessary, and proper for such officer or soldier while in quarters, engaged in the public service, in the line of duty: *And provided further,* That all claims now existing shall be presented within two years and not after from the passage of this act; and all such claims hereafter arising be presented within two years from the occurrence of the loss or destruction."

At the time of the passage of this act, the "proper accounting officers of the treasury," authorized and directed to settle claims arising under the act, were the Third Auditor, and the Second Comptroller. Paragraph 3, of Section 277, Revised Statutes provides:

"The Third Auditor shall receive and examine all accounts relative to the subsistence of the Army, the Quartermaster's Department, and generally all acounts of the War Department other than those provided for; all accounts relating to pensions for the Army, and all accounts for compensation for the loss of horses and equipments of officers and enlisted men in the military service of the United States, and for the loss of horses and equipments, or of steamboats, and all other modes of transportation, in the service of the United States by contract or impressment; and, after the examination of such accounts he shall certify the balances and shall transmit such accounts, with all the vouchers and papers and the certificate, to the Second Comptroller for his decision thereon."

Section 273, Revised Statutes, in part provides:

"It shall be the duty of the Second Comptroller:

"First. To examine all accounts settled by the Second, Third, and Fourth Auditors, and certify the balances arising thereon to the Secretary of the Department in which the expenditure has been incurred."

Sec. 191, Revised Statutes, is as follows:

"The balances which may from time to time be stated by the Auditor and certified to the heads of Departments by the Commissioner of Customs, or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of Departments, but shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts. The head of the proper Department, before signing a warrant for any balance certified to him by a Comptroller, may, however, submit to such Comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided."

Under Section 277, Revised Statutes, the Third Auditor had primary jurisdiction over claims or accounts arising under the Act of 1885, it being his duty to examine said claims, and certify his action thereon to the Second Comptroller, for losses provision for the payment of which is made by Section 273, Revised Statutes, and the decision of the Second Comptroller was made final and conclusive by Section 191 Revised Statutes.

The first provision of the Act of 1885, *supra*, reading,

"That any claim which shall be presented and acted on 'under authority of this act, shall be held as finally determined, "and shall never thereafter be re-opened or considered,"

—must be read in the light of the law found in Sections 277, 273, and 191, Revised Statutes, which made the action of the Second Comptroller final, and whose action

"shall never thereafter be re-opened or considered."

Section 24 of the Act of July 31, 1894 (28 Stats. at Large, p. 211,) provides:

"The provisions of sections three to twenty-three inclusive of this act shall be in force on and after the first day of October, eighteen hundred and ninety-four."

Section 4 of the act abolished the offices of Second Comptroller and Commissioner of Customs, and declared that:

"The *First* Comptroller of the Treasury shall hereafter be known as Comptroller of the Treasury. He shall perform the same duties and have the same powers and responsibilities (except as modified by this act) as those now performed by or appertaining to the First and Second Comptrollers of the Treasury and the Commissioner of Customs; and all provisions of law not inconsistent with this act, in any way relating to them or either of them, shall hereafter be construed and held as relating to the Comptroller of the Treasury."

Section 3 of the act changes the designations of the different Auditors so as to correspond with the names of the different

departments of the Government. Under paragraph "Second" of Section 7, the Auditor for the War Department was given jurisdiction over all accounts, etc., arising in or under the War Department. It thus became his duty to examine and settle claims arising under the act of 1885, *supra*.

We now come to section 8 of the act of 1894, page 207, which provides:

"The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster General, upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government, *except*, that any person whose account may have been settled, the head of any Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decison upon such revision shall be final and conclusive upon the Executive Branch of the Government: *Provided*, that the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the re-examination of any account."

From Section 8 it clearly appears that the action of the Auditor for the War Department is final and conclusive *unless*, and only *unless* and within a year from the date of the Auditor's settlement, the account shall be revised by the Comptroller of the Treasury, upon the application of the claimant, the Secretary of War (in this case), the Secretary of the Treasury, or by the Comptroller of the Treasury upon his own motion. Had the Auditor's action been unsatisfactory to the claimant, the latter would have had the right to demand a revision by the Comptroller. The Comptroller had the same right to revise the account of his own motion. The action of the Comptroller in such a case is in no proper sense a re-open-

ing of a settled account because the action of the Auditor was only tentative, and would not become final until the lapse of a year from the date of said action. This section makes the decision of the Comptroller final and conclusive as to those accounts revised by him.

The second paragraph of Section 8 provides:

"Upon a certificate by the Comptroller of the Treasury of any differences ascertained by him upon revision the Auditor who shall have audited the account shall state an account of such differences, and certify it to the divison of Bookkeeping and Warrants."

It will be seen that the Comptroller had authority of law to revise this account which he did within a year, and it then became the duty of the Auditor, under the second paragraph of Section 8, quoted, to re-state the account in accordance with the findings of the Comptroller as per his statement of differences. The Comptroller had the right, and it was his duty, to pass upon the evidence submitted to the Auditor, and, if the former was of opinion that said evidence failed to sustain the claim, to disallow it.

THE ACCOUNT WAS NEVER SO FINALLY DETERMINED AS TO COME WITHIN THE PROVISIONS OF THE ACT OF 1885, AND THE STATUTES THEN IN FORCE.

Should it be contended, however, that the claim of Captain Wilcox should have been settled and allowed under the Act of 1885 and the statutes then in force, then we contend it should have been passed upon and allowed by the Comptroller

of the Treasury before it was so finally settled and allowed as to bring it within the first proviso of the act of 1885 and the statutes then in force.

It will be remembered that, under the act of 1885, the *proper accounting officers of the Treasury* are authorized and directed to examine into, ascertain and determine the value of the private property belonging to officers and men in the military service which may have been lost or destroyed in such service, and the first proviso of the act of 1885 is as follows:

"That any claim which shall be presented and acted on under "authority of this act shall be held as finally determined and "shall never thereafter be re-opened or considered."

"Proper accounting officers" for claims of this character were, under the act of 1885 and the statutes then in force, those designated in paragraph 3 of Section 277, Section 273, and Section 191 of the Revised Statutes.

By paragraph 3 of said Section 277 the Third Auditor was authorized, among other things, to receive and examine all accounts arising under the provisions of the act of 1885. By Section 273 the Second Comptroller examined all accounts settled by the Third Auditor and certified the balances arising thereon to the Secretary of War Department. And Section 191, Revised Statutes, provided that the determination of the *Second Comptroller* should be final and conclusive upon the executive branch of the government and subject only to revision by congress or the proper courts. Hence, to make the determination of any such claim final, it was necessary that it be passed upon by the Second Comptroller.

The act of 1894 dispensed with the office of Third Auditor and imposed such duties theretofore appertaining to that office

and relating to the War Department, on the Auditor for the War Department, and also dispensed with the office of Second Comptroller and imposed the duties theretofore appertaining to that office upon the Comptroller of the Treasury. The claim in question was never settled by the Third Auditor nor by the Second Comptroller. It was, however, on December 7, 1896, settled by the Auditor for the War Department.

Pursuant to the provisions of Section 191, Revised Statutes, and the act of 1885, it was the duty of the Second Comptroller (now Comptroller of the Treasury) to examine said account after the same had been settled by the Third Auditor. This was not done; but the claim, upon being settled by the Auditor for the War Department (3d Auditor), was immediately paid without any action having been taken thereon by the Comptroller of the Treasury (2d Comptroller). Therefore, when this claim was settled and allowed by the Auditor for the War Department and was thereafter paid, it was not so finally settled and allowed as to bring it within the meaning of the said first proviso of the act of 1885, *supra*, and the money paid to the claimant was an unauthorized payment under misconstruction of law; because under Section 191, Revised Statutes, the claim must have been settled and allowed by the Comptroller of the Treasury (2d Comptroller), and the action of the Auditor was not such a final settlement as is required by the Act of 1885, *supra* and the provisions of Section 191, Revised Statutes.

U. S. v. Windom, 137 U. S. 636.

The claimant has thus received money from the United States which he is not legally entitled to retain, and it may

be recovered back in a suit at law, under authority of the decision of the Supreme Court of the United States in the case of Wisconsin Central Ry. Co. v. U. S., 164 U. S. 190, wherein it was held (quoting from the syllabi):

"The government is not bound by the act of its officers making an unauthorized payment under misconstruction of the law, and parties receivng moneys illegally paid by a public officer are liable *ex aequo et bono* to refund them."

Mc. Elrath v. U. S., 102 U. S. 426.
U. S. v. Buschard, 125 U. S. 176.
U. S. v. Saunders, 79 Fed. 407.

The law prescribes what claims shall be paid (Act of 1885, *supra*) and if the disbursing officers of the government allowed and paid a claim which was not authorized by the law, the government is not bound by such action of its officers, but may go behind such decision and recover the money.

In the case of McElrath v. U. S., 102 U. S. 426, the court held (quoting from the syllabus):

"5. A claimant received from the government the amount ascertained by the proper accounting officers to be due him, protesting at the time that he was entitled to a larger sum, and announcing his purpose not to be bound by such settlement of his accounts. He then sued the government for the additional amount claimed by him. Held; that the government was entitled to go behind the settlement of its accounting officers and reclaim any sum which had been improperly allowed the claimant in such settlement."

And in the case of U. S. v. Buschard, 125 U. S. 176, the court say:

"This is a case where the disbursing officers supposing that a retired officer of the navy was entitled to more than it turns out the law allowed, have over-paid him. Certainly under such circumstances the mistake may be corrected."

The court in the case of U. S. v. Saunders, 79 Fed. 407, held, (quoting from syllabus):

"The rule applied that the United States have the right to recover money paid by the errors of their disbursing officers, as much where the error is one of law as of fact, provided only the moneys belong to the United States *ex aequo et bono.*"

The decisions above quoted are sustained and upheld by the later decision of the court in the case of Wisconsin Central R. R. Co. v. U. S., 164 U. S. 190, wherein it was held:

"The government is not bound by the act of its officers making an unauthorized payment under misconstruction of the law." And

"parties receiving moneys illegally paid by a public officer are "liable *exaequo et bono* to refund them."

In conclusion, it is submitted that the decree of the court below sustaining defendant's demurrer should be reversed and the case remanded with instructions to overrule the demurrer.

L. H. Valentine *U. S. Attorney,*

Geo. L. McKeeby, *Assistant U. S. Attorney.*

Solicitors for Plaintiff in Error.

No. 787.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff in Error,
vs
E. F. WILCOX,
Defendant in Error.

Brief on Behalf of Defendant in Error

OLIVER P. EVANS,
Solicitor for Defendant in Error.

Upon Writ of Error to the Circuit Court of the United States for the Southern District of California, in and for the Northern Division.

PECKHAM & SON, PRINTERS, 516 SACRAMENTO STREET, S. F.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff in Error, vs E. F. WILCOX, Defendant in Error.	Number 787

Brief on Behalf of Defendant in Error.

The Court below sustained a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. This ruling alone is assigned as error. Counsel for plaintiff in error presumably know that only the facts stated in the complaint can be referred to, considered, or reviewed on this appeal. But notwithstanding this presumed knowledge matters dehors the record constitute the principal part of their so called "state-

ment of the case." This should not be so, and it necessitates a full statement on the part of defendant in error. It appears from the complaint (Tran. pp 5, 6 and 7) that the material facts are :

First: That Lieutenant (now Captain) E. F. Wilcox of the 6th U. S. Cavalry, did render his account to the United States in the sum of $200.00, the alleged value of a certain horse claimed by him "to have been *lost* in the military service of the United States" on the 6th day of April, A. D. 1889.

Second: "Which account was *duly* presented to "the War Department; and (the) claim (was) num- "bered 108,188."

Third: "That afterward, to-wit, on the 7th day "of December, 1896, said account was *duly settled* "by the Auditor of the War Department, and a cer- "tificate of setltlement numbered 1,737 *duly* issued "by the said Auditor * * * for the said sum of "$200.00."

Fourth: "Which sum of $200.00 was paid to "said defendant on or about the 14th day of De- "cember, 1896."

Fifth: "That on the 28th day of May, 1897, "(more than 5 months thereafter, or *after payment*) "the Comptroller of the Treasury directed a revis- "ion of said claim * * and disallowed said claim "for the reason that the loss of the said horse * * "was not without fault on the part of said de- "fendant; and the said defendant by his negligence

"contributed to the loss of said horse, and thereby "was not entitled to recover for said loss, under the "act of March 3, 1885. (23 Stat. at Large, p 350.)"

Sixth: "That thereafter, to-wit, on the 24th day "of May, A. D. 1898, acting on the direction of the "Comptroller of the Treasury, the Auditor of the "War Department, at Washington, D. C., restated "said claim * * and issued a new certificate num- "ber 4,867, raising a charge" of $200.00 against defendant by reason of which he became indebted to the plaintiff in the sum of $200.00.

Was the demurrer properly sustained?

The statement by counsel for plaintiff in error contains many *errors* and other matters, not only not in the complaint but the facts which are in the complaint are misstated in such a way as, possibly, to mislead the Court—although not so intended.

In counsel's "Statement of the Case," it is said "Lieutenant E. F. Wilcox, now Captain Wilcox, *filed* a claim in the Third Auditor's office (now the office of the Auditor of the Interior Department) on April 25th, 1889." But the "complaint" only alleges, in this behalf, that said defendant "as such lieutenant, did render his account to the United States" and nothing is said as to where, when, or in what office it was filed, or that it was ever filed. Presumably whatever was necessary to be done was done as he "did render his account to the United

States" and was paid $200.00. Counsel draw on their imagination for particulars.

In the "Complaint" the language is "the value of a certain horse then and there claimed by said defendant to have been *lost* in the military service."

Counsel prefer that the horse should have been *killed* not *lost*, so they say "the value of a horse belonging to him and alleged to have been *killed*." But they are not satisfied merely to have the animal *killed* and not *lost*, as alleged in the complaint, so they draw upon their imagination—or have a story invented as to *how* the horse was killed, viz: "shot by order of claimant"—the defendant in this action. Remember this is pure invention of counsel for plaintiff in error—not one word about it in the complaint.

"It was not necessary that the horse should have been turned into a corral"—say counsel. Well! perhaps it was not—the complaint is silent on the subject. If counsel in their fiction—(any matter stated by them outside of what is alleged in the complaint must, for the purpose of this argument, be here treated as mere fiction) did not like the idea of having the horse hurt in a corral—they might have had it hurt in some other way—so long as they keep to the main idea that he was shot or killed by Capt. Wilcox or by his order. They might as well as not have thrown in a little malice and pictured the killing to have been most brutal. However

they are not proud of the yarn as they tell it and have it printed in quotation marks as though it had been originally told by some one else. It may have been so, who knows? The complaint is silent upon the subject. But some things are certain. The claim made by Lieutenant Wilcox was *paid* on the 14th day of December, 1896, and no attempt by the Comptroller to review, or restate it was made until long afterwards, and no claim is now made that there was any fraud or mistake in connection with its allowance or payment. Counsel's statement that it was not paid until December 1897 is wrong, it was paid December 14th, 1896.

The Argument.

The novelty of the suggestion, that without any notice, or hearing, the Comptroller of the Treasury, or the Auditor of the War Department, or both acting together, could arbitrarily, and of their own motion, revise and reject a claim that had been duly presented, allowed and paid, is obvious.

The further suggestion that they could, in like manner, raise "a charge af two hundred ($200.00) dollars against said defendant; by reason of which he became then and there indebted to plaintiff in the sum of $200.00" is certainly supremely absurd.

Such proceedings would not be "*due process of law.*"

All presumptions are to be indulged in favor of

the claim that was allowed and paid. Presumably ample evidence was presented to support it, and that all the proceedings leading up to and including its payment were regular. The complaint fully supports this idea, and nothing to the contrary is suggested. On the other hand, no suggestion even, is made that the defendant ever had the slightest notice of the subsequent proceedings or any chance whatever to be heard or make a defense to the arbitrary proceedings of the Comptroller had "on his own motion." But still worse than all this is claimed. The loose statements of the Comptroller's alleged reasons for what he did to bind the defendant, are not stated by way of allegations in a pleading to be now controverted or tried—but rather by way of recital and notice—that the plaintiff has a final judgment which must be presently paid. The suggestion is repugnant to common sense and all our ideas of justice and fair dealing. It will not do.

The act of March 3, 1885, under which defendant presented his claim which was allowed and paid, is copied on page 3 of plaintiff's brief and the first *proviso* therein contained is

"That any claim which shall be presented and "acted on under authority of this act shall be held "as finally determined, and shall never thereafter be "reopened or considered."

Conceding for the moment, that the proceedings had on the claim of Lieutenant Wilcox, could have

been arrested and reviewed at any time by proper proceedings had before the claim was finally allowed and paid, it must also be conceded that, under this act, it was too late after the money had been paid.

The head note to the case of United States vs. Olmsted, 106 Federal Reporter, 286, reads:

"Where the claim of an army officer against the "government for the value of personal property lost "in the service, presented under act March 3, "1885 (23 Stat. 350), which provides that 'any "claim which shall be presented and acted on under "authority of this act shall be held as finally deter- "mined and shall never thereafter be reopened or "considered' was allowed by the Auditor for the "War Department, and paid, the government can- "not recover the amount so paid from such officer "upon a petition showing that the claim was subse- "quently revised by the Comptroller and disallowed "because of the insufficiency of the proofs, and that "the Auditor thereafter settled the claim, and "charged the amount back to the officer, there being "no allegation of fraud or mistake, or that the claim "was not in fact one properly allowable under the "Statute; and especially where it is not shown that "the officer was advised of the action taken after "the payment was made."

The opinion of the Court is much fuller than the head note, and fully sustains the ruling of the Court below in case at bar.

The act of March 3, 1885, recites "That the "proper accounting officers of the treasury be, and "they are hereby, authorized and directed to examine "into, ascertain, and determine the value of the pri- "vate property belonging to officers * * which "has been, or may hereafter be, lost or destroyed in "the military service, under the following circum- "stances * * Where such loss or destruction was "without fault or negligence on the part of claimant. " * *And the amount of such loss so ascertained "and determined shall be paid out of any money in "the treasury not otherwise appropriated, and shall "be in full for such loss or damage; *Provided*, That "any claim which shall be presented and acted on "under authority of this act *shall be held as finally "determined, and shall never thereafter be reopened "or considered:* " etc.

The claim of Wilcox was presented, acted on, and paid, under this Act. Could the Comptroller after once acting upon the claim, and *after payment* act on it again and disallow it?

It is alleged in the complaint that—he—the Comptroller "disallowed said claim of defendant, for the reason that the loss of said horse on which the said claim of defendant, was based was not without fault on the part of said defendant."

No fact is pleaded calling for an answer. It is suggested that the Second Comptroller should have acted upon the claim before it was, or could be paid.

It is not alleged that he *did not* so act. Perhaps he did. We certainly have a right to assume that he did,—because the Auditor of the War Department *duly settled* the claim, *duly issued* the certificate on the 7th day of December, 1896, and it was paid December 14th, 1896. Then we must presume that all "the proper accounting officers of the treasury" contemplated by act of 1885, had acted before payment was made. If so then it was "acted on under authority of this act (and) shall be held as finally determined, and shall never thereafter be reopened or considered"—no, not even by this action. The Comptroller could not under this act, "disallow" the claim—or direct "the Auditor of the War Department at Washington, D. C." (or at any other place) to "restate said claim of defendant" or raise "a charge of $200.00 against said defendant."

Counsel for plaintiff in error on second page of their brief, state, in quotation marks, what they claim was the Comptroller's "*reasons*" for his action in trying to open or disallow the claim after it had been paid, or as they put it, "on May 28, 1897, the Comptroller of the Treasury revised said account, on his own motion, and disallowed the amount which had been allowed by the Auditor, for reasons stated as follows: and then profess to quote something *not in* the complaint, and we make this supposition by way of argument. Suppose the facts in the case were or had been submitted by the Third Auditor to the Second Comptroller of the Treasury,

March 7, 1890, with the information, that the claim seemed to him to come within the provisions of the Act of March 3, 1885. That he approved the claim and then referred the papers to the Secretary of War for his action, under the Act of 1885. And then that the Secretary of War had returned the papers to the accounting officers of the Treasury, August 24, 1896, with the following indorsement:

> Under the provisions of the Act of Congress, approved March 3, 1885, Stats. 23, p. 350, Chap. 335, it is certified that the horse men tioned in the within claim is reasonable, useful, necessary and proper for an officer while in quarters, engaged in the public service in the line of duty.

And then that the claim was examined and settled December 7, 1896, by Treasury Certificate, No. 1737, in favor of said officer, for $200, to be payable out of the appropriation of claims of officers and men of the army, for destruction of private property, Act March 3, 1885.

The allegations of what was done are entirely consistent with the idea that all the accounting officers did their duty. The claim having been paid the presumption is that it was properly paid.

The suggestion that long after the claim was allowed and paid—the Comptroller of the Treasury assumed to disallow it, raises no presumption that

he had not previously allowed it. This Act is a special Act as to this class of cases, and when any claim "shall be presented and acted on under the authority of this act (it) shall be held as finally determined, and shall never thereafter be re-opened or considered."

What is said by Counsel on page nine of their brief as to what *was not done* by certain officers has no warrant in the complaint. There is no allegation that *these* things were *not* done. The mere fact that the treasury paid the claim raises the presumption—as has been unnecessarily repeated—that all proper officers had acted upon, allowed and approved it. The complaint is fatally defective and no amount of assertion or declamation can cure it. The demurrer was properly sustained. It is said "The money paid to claimant was an unauthorized payment under misconstruction of law." Then why did not the pleader state the facts in the complaint? The money was paid—and presumably properly paid. But Counsel would have the Court presume facts not alleged.

I have examined the authorities cited by Counsel and find nothing therein inconsistent with the order appealed from.

It needs no citation of authority to show that money paid out by the government through mistake can be recovered. But such mistake will not be

presumed—it must *exist*, be properly *pleaded* and *proved*.

It is respectfully suggested that the order overruling the demurrer should be sustained.

OLIVER P. EVANS,
Solicitor for Defendant in Error.

No. 794

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, A NATIONAL BANKING ASSOCIATION,

Appellant,

vs.

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, AND JOSEPH H. SCOTT, AS TAX COLLECTOR OF SAID CITY AND COUNTY,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the United States Circuit Court for the Northern District of California.

THE FILMER BROTHERS CO. PRINT, 424 SANSOME STREET, S. F.

INDEX.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,

Complainant,

vs.

WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California.

Defendant.

Bill in Equity.

To the Judges of the Circuit Court of the United States for the Northern District of California, in the Ninth Circuit, Sitting in Equity:

The Nevada National Bank of San Francisco, a national banking association organized and existing under and by virtue of the laws of the United States, brings and files this its bill of complaint against Washington Dodge, as Assessor of the City and County of San Francisco, State of California, and thereupon humbly complaining your Orator, the Nevada National Bank of San Francisco aforesaid, shows to your Honors as follows:

1.

That on January 1st, A. D. 1898, your orator was, and at all times thence hitherto has been, and still is, a

national banking association, organized and existing under and by virtue of the laws of the United States, for carrying on the business of banking, as provided for and authorized by the provisions of the statutes of the United States in this behalf, with a capital stock of three millions of dollars, divided into thirty thousand shares of stock of the par value of one hundred dollars to each share; that the place where its banking house and its operations of discount and deposit were and are carried on and its general business conducted, as authorized and provided for in its articles of association, is the City and County of San Francisco, State of California, where it has been and is doing business in this State, and where it has its principal place of business in this State.

2.

That Washington Dodge, the defendant above named, was, on January 1st, A. D. 1899, thence hitherto has been, and still is, the duly elected, qualified and acting Assessor of the City and County of San Francisco, State of California, and was and is a citizen of the State of California and a resident and inhabitant of said Northern District of California, and was and is the person and officer under and by virtue of the laws of the State of California authorized, as hereinafter more particularly set out, to assess taxes for and in the City and County of San Francisco.

3.

That by an act of the legislature of the State of California, approved March 7th, 1881, entitled "An Act to

amend the Political Code of the State of California relating to revenue, by adding a new section to be known as section 3608 of said code, and by amending sections 3607, 3617, 3627, 3629, 3650 and 3651 and 3652 of said code, and by repealing section 3640 of said code, all relative to revenue"—there was, among other things, on said 7th day of March, 1881, added to the Political Code of said State of California a new section numbered 3608, in the words and figures following, to wit:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares, and also of the corporate property, would be double taxation. Therefore, all property belonging to corporations shall be assessed and taxed, but no assessment shall be made on shares of stock, nor shall any holder thereof be taxed therefor."

That by an act of the legislature enacted on the 14th day of March, 1899, entitled "An act to amend section 3608 of the Political Code of the State of California relating to the general revenue of the State and to property liable to taxation for the purpose of revenue, and to add new sections to be known as sections 3609 and 3610, and also relating to the general revenue of the State and to property liable to taxation for the purpose of revenue,"—said section 3608 was, on said 14th day of March, 1899, amended so as to read as follows:

"3608. Shares of stock in corporations possess no in-

trinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also all the corporate property would be double taxation. Therefor, all property belonging to corporations, save and except the property of national banking associations, not assessable by federal statute, shall be assessed and taxed, but no assessment shall be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by federal statute.

That by said act of March 14th, 1899, there were on said 14th day of March, A. D. 1899, added to the said Political Code of the State of California, two new sections numbered respectively 3609 and 3610, and being respective in the words and figures following, to wit:

"3609. The stockholders in every national banking association doing business in this state, and having its principal place of business located in this state, shall be assessed and taxed on the value of their shares of stock therein; and said shares shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town, or county, or not; but in the assessment of such shares, each stockholder shall be allowed all the deductions permitted by law to the holders of

moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the provision of paragraph six of section thirty-six hundred and twenty-nine of the Political Code of the State of California. In making such assessment to each stockholder there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state."

"3610. The assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholders of such assessment shall be necessary for the purpose of this act. And in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other

liens, on his said stock, and the dividends and earnings thereof, for the reimbursement to it of such taxes so paid."

4.

That under and by virtue of the constitution of the State of California all property not exempt from taxation under the laws of the United States and under the laws of the State of California, in the possession or under the control of any person, at 12 o'clock noon on the first Monday in March in each year, is subject to assessment and taxation as by the laws of said State of California provided for the fiscal year ending upon the 30th day of June of the next succeeding year, as hereinafter more particularly set out.

5.

That pursuant to the requirements of the Revised Statutes of the United States in that behalf, the President and Cashier of your orator have at all times caused to be kept, and do now keep, in the office where the business of your orator is transacted, to wit, in said office in the City and County of San Francisco, a full and correct list of the names and residences of all of the shareholders of your orator, said list containing the number of shares held by each of said shareholders; that said list, during all of the times hereinafter mentioned has been, and is, during the business hours of each day in which business could have been or was legally transacted, subject to the inspection of said defendant; that on or about the 7th day of March, A. D. 1900, your orator, at the request of said defendant,

gave and delivered to him a full and correct list of the names and residences of the shareholders of your orator, as the same appear on the full and correct list of shareholders kept as aforesaid, showing the number of shares of its stock held by each of said shareholders, at 12 o'clock noon on the 5th day of March, A. D. 1900, said 5th day of March, A. D. 1900, being the first Monday in March, A. D. 1900; that the number of said shareholders at 12 o'clock noon on said first Monday in March, A. D. 1900, was two hundred and three (203).

6.

That under the provisions of the constitution of the State of California the fiscal year in said State of California is from the first day of July of each year to the thirtieth day of June of the next succeeding year; and that, pursuant to the laws of said state, the Board of Supervisors of said City and County of San Francisco did, on September 18th, 1899, fix the rate of tax for said City and County for the fiscal year ending June 30th, 1900, at the rate of $1.029 on each $100 valuation of the taxable property upon the assessment books of said City and County for said fiscal year; and that the State Board of Equalization of said State of California, pursuant to the laws of the State of California in that behalf, at the time and in the manner provided therefor by law, did fix the rate of taxation for the fiscal year ending June 30th, 1900, on all property, both real and personal, in the City and County of San Francisco, at the rate of 60 cents and one mill on each $100 of valuation of said property for said

fiscal year; and thereafter, to wit, on September 18th, A. D. 1899, said Board of Supervisors of said City and County of San Francisco did fix the rate of state taxation for the fiscal year ending June 30th, 1900, on all property of said City and County of San Francisco not exempt by law at the sum of 60 cents and one mill on each $100 valuation of said taxable property upon the assessment roll for said fiscal year; the combined rate of taxes for said fiscal year for state, city and county purposes amounting to the sum of $1.63 on each $100 valuation of taxable property in said City and County of San Francisco.

7.

That under and by virtue of the laws of said State of California every tax due upon personal property is a lien upon the real property of the owner of said personal property from and after 12 o'clock noon of the first Monday of March in each year; and that, under and pursuant to the laws of the State of California, the defendant claims the right when any taxes on personal property are not a lien upon real property sufficient to secure the payment thereof, to collect all such taxes between the first Monday in March and the third Monday in July of each year; and under said laws said defendant claims the power to make such collection by seizure and sale of any personal property owned by the person against whom such tax is assessed, said sale to be of an amount of such personal property sufficient to pay the taxes, the percentage thereon provided by law, and the costs of sale; and that, under and by virtue of said laws,

said defendant is governed as to the amount of taxes to be collected on such personal property by the state and city and county rate of taxation for the previous fiscal year.

8.

That said defendant, as Assessor as aforesaid, has notified and informed your orator that he, as such Assessor, is about to assess, and your orator verily believes that, unless restrained by this Honorable Court, he will, under and by virtue of the aforesaid act of the legislature of March 14th, 1899, amending the provisions of the Political Code of said State of California as hereinbefore set forth, and not otherwise, assess the shares of the capital stock of your orator at a valuation of $113 per share for each and every share of the capital stock of your orator, and in case the tax on any of such stock is unsecured by real estate owned by the respective holders of such stock, then and in that event that he will collect, as provided in and by said section 3610 of said Political Code, the amount of such tax from your orator, at the hereinbefore alleged rate of taxation on the valuation of such shares. That the amount of such tax, at the rate of taxation for city, county and state purposes as aforesaid, of $1.63 upon the $100 valuation of said stock as hereinbefore last stated, will amount to the sum of $1.8419 upon each share of said capital stock; that on said first Monday of March, A. D. 1900, the taxes upon 12,293 shares of said capital stock were, thence hitherto have been, and still are unsecured by real estate owned by the holders of such stock; that the taxes upon said 12,293 shares of stock at the aforesaid valu-

ation thereof and at the rate of taxation thereon hereinbefore alleged will be the sum of $22,642.47. And said defendant, as Assessor as aforesaid, has notified and informed and threatened your orator that said sum of $22,642.47 will be collectible from your orator, and that, as such Assessor, he will enforce payment and collection thereof from your orator, unless restrained from so doing by this Honorable Court; and your orator verily believes that said defendant, as Assessor as aforesaid, unless restrained therefrom by this Honorable Court, will carry out and execute his aforesaid threats to make said assessment upon the capital stock of your orator as hereinbefore stated, and to enforce collection and payment of the tax thereon of and from your orator as hereinbefore stated.

9.

That on January 1st, A. D. 1900, and long prior thereto, and thence hitherto, there was and is an association doing business in said City and County of San Francisco known as and called the Stock and Bond Exchange; that said association is composed of members, stockholders admitted thereto, and none others; that said association, during the several periods of time herein last before stated, had, and has, a place of business in said City and County of San Francisco, whereat are sold stocks, bonds, United States bonds, and securities, at the board sessions thereof; that the manner of making such sales is as follows, that is to say: in open session of said board, whereat, however, only members of said board are admitted, the caller of said board calls off a list of the names of the several bonds, stocks and

securities designed to be offered for sale, and as he so calls off the same such broker as may desire to buy or sell any of the same publicly announces the amount he is willing to bid or offer therefor per share and the number of shares that he is willing to take or sell; whereupon the offering and bidding brokers, having agreed upon a purchase or sale, as the case may be, said caller publicly announces the same, and thereupon the purchasing broker pays for and accepts the delivery of the stocks, bonds or securities so bought, and pays therefor according to the terms of his bid. That only such stocks of corporations are sold at said board as are what are technically called listed thereon or listed upon said board: that is to say, such corporations as desire to list their stocks for sale at said board pay said board the sum of $100 a year for so listing the same, which listing means that the stocks of the corporation so listed are regularly offered for sale at the official sales of said board, and only such stocks as are listed as aforesaid are offered for sale or sold at the official sales of said board, and only sales or offers for sale of such stocks are officially reported in the official report of the proceedings of said exchange; that where the stock of corporations is listed, the sales or offers for sales thereof at said exchange are regularly reported from day to day in the official publication of the proceedings of said board, whether sales thereof actually take place or not; where sales thereof do not actually take place on the day the same are so reported, the rate of sale or offer for sale last actually had at said Board is

reported until such time as from actual sale or offer for sale of the same the price thereof may be changed. But the stocks of corporations not so listed thereon are never reported, and do not appear in said publication except where unofficial sale of the same may have been actually made after the regular sessions of said board.

That in making sales of stock in manner aforesaid, the value of the assets of the corporation whose stock may be sold or offered for sale constitutes a material inducement to the sale of the same, and in estimating such value, where the corporation holds United States bonds or other property or securities exempt from taxation, the market value of the same is taken into account, and not merely the face or par value of the same. That in making sales of stock in manner aforesaid, the prosperous condition and future prospects of the business of the corporation whose stock may be sold or offered for sale, as well as the known character of the management of the business for skill and ability are taken into account and form material elements in estimating the price of the stocks so sold, and frequently the sale of stocks so sold and the price realized upon such sales are materially affected by combinations of purchasers or sellers at such sales formed for the purpose of depressing or raising the prices to be realized at such sales of said stocks; that while the value of the corporate assets of the corporation whose stock is thus sold or offered for sale constitutes a material inducement to such sales, the prices realized thereat are not exclusively based thereon, but in addition thereto are based upon

purely speculative and conjectural considerations without foundation in fact; that such market value of said bonds, stocks and other property fluctuates from day to day, sometimes amounting to a very large premium: that is to say, the premium upon stock is the amount of the market value thereof over and above the par or face value of the same, and the premium upon bonds is the market value of the same over and above the par or face value of the same.

That the aforesaid sales, made in manner aforesaid in the Stock and Bond Exchange aforesaid, are daily reported in a newspaper or periodical published twice a day under and by authority of the Stock and Bond Exchange aforesaid, and known as and called "The Stock and Bond Exchange"; that from the sales so made and reported in the Stock and Bond Exchange publication as aforesaid is ascertained the current market value of such stocks, bonds and securities as are offered for sale and sold as aforesaid. That on said first Monday of March, A. D. 1900, to wit, on March 5th, noon, A. D. 1900, your orator held and owned $2,070,000 of bonds of the United States, under the laws of the United States, and of the State of California, exempt from assessment and taxation by the State of California; that on the day and year last aforesaid the premium on said $2,070,000 bonds was the sum of $265,284.05, making said $2,070,000 of United States bonds with the premium thereto, equal to the sum of $2,335,284.05; that on said first Monday of March, A. D. 1900, to wit, on March 5th, noon, A. D. 1900,

your orator held and owned the sum of $2,276,917 in cash, exempt under the laws of the United States and of the State of California from assessment and taxation by the State of California; that on said first Monday of March, A. D. 1900, to wit, on March 5th, noon, A. D. 1900, your orator held and owned $963,099.88 of bonds of a miscellaneous character, to wit, bonds of corporations organized and acting under the laws of the State of California for the purpose of constructing, owning and operating railroads, and other bonds of a miscellaneous character, which bonds, on the day and year last named, as the corporate property of your orator, were and still are exempt under the laws of the United States and of the State of California, from assessment and taxation by the State of California; that the stock of your orator on said first Monday of March, A. D. 1900, to wit, March 5th, A. D. 1900, was not listed upon said Stock and Bond Exchange, and had not been for nearly a year prior thereto; that on or about February 28th, A. D. 1900, an unofficial sale of the stock of your orator was reported in said official publication known as the Stock and Bond Exchange at $185 per share, since which time no sale of any of the stock of your orator has been reported in said publication said "Stock and Bond Exchange."

10.

That your orator is informed by said defendant, and verily believes, and, upon and according to such information and belief, charges the fact to be that said defendant, unless restrained therefrom by this Honorable Court

in making said assessment upon the shares of the capital stock of your orator, will make the same in manner following, that is to say: he will make allowance for exemptions as follows, to wit:

(1) For United States bonds	$2,142,400.00
(2) For fixtures	3,450.00
(3) Taxes	582.00
(4) Expenses	16,240.00
Total exemptions	$2,162,672.00

Which last-named sum he will divide by 30,000 shares of the capital stock of your orator, leaving $72.08 as the amount of exemption upon each share of the capital stock of your orator.

That the value of the capital stock he will assess at $185 per share, from which he will deduct said $72.08, leaving the difference of $112.92 which, for the purpose of assessment, he will treat as $113, as the assessable value of each share of the capital stock of your orator.

That said defendant, as Assessor as aforesaid, in ascertaining and determining the value of the capital stock of your orator at $185 per share as aforesaid, will ascertain and determine the same exclusively from the report thereof made in said Stock and Bond Exchange on said February 28th as hereinbefore stated, and not otherwise.

That in making said assessment said defendant will exclude from the amount of exemptions aforesaid the sum of $265,284.05, the amount of the premium upon said United States bonds, claiming and insisting that while said Uni-

ted States bonds, are exempt from and not liable to assessment or taxation, the aforesaid premium thereon is liable to assessment and taxation.

That in ascertaining the market value of said stock in manner aforesaid, the market value of said bonds will be taken into account, including the premium thereof, but in ascertaining the amount of deductions to which the stock of your orator is and will be entitled in making said assessment, the amount of said premium will not be deducted.

That in making said assessment said defendant will exclude from the amount of exemptions to which your orator is and will be entitled as herein alleged, the aforesaid sum of $2,276,917, cash on hand, and also said sum of $963,099 of miscellaneous bonds, claiming and insisting that, although the same constitute part and parcel of the corporate property of your orator, the same nevertheless is not and will not be exempt from assessment and taxation under the laws of the United States and the State of California.

That in making said assessment said defendant, as Assessor as aforesaid, will not exclude from consideration and from constituting an element of the amount of such assessment the corporate property of your orator, except real estate, notwithstanding the same is and will be exempt under the constitution and laws of the United States and of the State of California from assessment and taxation.

11.

That under the laws of the State of California all shares of stock in corporations organized under the laws of said State are exempt from taxation, save and except of national bank associations, whose property, other than real estate, is by federal statute exempt from assessment and taxation.

That shares of stock of the par value of more than the sum of two hundred million of dollars are so exempted.

That shares of stock of the par value of thirty-three millions and upwards of corporations organized and existing and doing business under the laws of the State of California in the business of banking are by law exempt from taxation, and said defendant, as Assessor as aforesaid, has not and will not assess the same to the owners and holders thereof, or otherwise or at all, for the fiscal year ending June 30th, 1901, and does not intend to assess to the holders of such shares in such corporations the value of the same or to collect from such shareholders any taxes on such shares or the value thereof, by reason whereof said assessment upon the capital stock of your orator, assessed as aforesaid, will be in violation of and repugnant to the provisions of sections 5219 and 1977 of the Revised Statutes of the United States in that said taxation is and will be at a greater rate than is or will be assessed upon other moneyed capital in the hands of individual citizens in said State of California for said last-mentioned fiscal year.

And your orator further shows that the said pretended assessment and taxation, so to be made by said defendant

upon the shares of the capital stock of your orator is and will be in violation of and repugnant to the provisions of said section 5219 of the Revised Statutes of the United States, in that said taxation is and will be at a greater rate than is or will be assessed upon other moneyed capital in the hands of individual citizens of said State of California.

And in that behalf your orator further shows that in assessing and taxing said shares of stock of your orator no deductions can legally be made from the valuation of said shares or of any of them for debts unsecured by deed of trust, mortgage or other lien on real or personal property due or owing by the shareholders of your orator or any of them to bona fide residents of the State of California; and that, in assessing and taxing other moneyed capital in the form of solvent credits unsecured by deed of trust, mortgage or other lien on real or personal property due or owing to or in the hands of individual citizens of said State of California, a deduction is and will be made from said credits under and by the laws of the State of California of the debts unsecured by trust deed, mortgage or other lien on real or personal property as may be owing by such individual citizens or any of them to bona fide residents of the State of California, and that said assessment and taxation of the shares of your orator is and will be unjust, unlawful and illegal, and will discriminate against and upon such shares and against and upon the persons owning and holding the same, and compel them to sustain and bear more than their just share and burden of the taxes of said State of California.

And in this behalf your orator avers that it is informed and believes, and upon such information and belief states the fact to be, that the amount of moneyed capital in the City and County of San Francisco in said State, on the first Monday of March, A. D. 1900, to wit, on March 5th, 1900, at noon of said day, invested by banks and bankers having their principal place of business in said city and county, and residents therein, in unsecured solvent credits, and from which, under the constitution and laws of said State, unsecured debts can be deducted, was the sum of $14,074,561; and on the day and year last aforesaid the amount of moneyed capital in the State of California, other than in the said City and County of San Francisco, invested by banks and bankers in unsecured solvent credits, and from which, under the constitution and laws of said State, unsecured debts can be deducted, was the sum of $7,589,302; that on the day and year last aforesaid said banks and bankers in said City and County of San Francisco had debts unsecured by trust deed, mortgage or other lien on real or personal property, owing by such banks and bankers in said city and county, amounting to the sum of $36,710,062; and that, on said day last aforesaid, the amount of debts unsecured by trust deed, mortgage or other lien on real or personal property owing by said banks and bankers in the State of California, other than in the said City and County of San Francisco, was the sum of $32,400,304; that the amount of moneyed capital invested in such solvent credits by such banks and bankers on the day and year last aforesaid, as compared

with the amount of moneyed capital invested in the shares of the capital stock of your orator is so large and substantial that the assessment and taxation of the shares of the capital stock of your orator without being able to deduct therefrom debts unsecured by trust deed, mortgage or other lien, on real or personal property as may have been owing by the respective holders of the shares of the capital stock of your orator on the day and year last aforesaid, will be illegal and unjust discrimination against the owners and holders of the shares of the capital stock of your orator, and will make the taxation of such shares of stock at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens in the State of California, and particularly in the City and County of San Francisco in said State

12.

That in making said assessment of said shares of the capital stock of your orator said defendant will not proceed in the manner directed by said act of the legislature of March 14th, 1899, in this: that in making such assessment to each stockholder of your orator he will not deduct from the value of his share of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of the capital stock of your orator.

That on the first Monday of March, A. D. 1900, to wit, on March 5th, 1900, your orator had not, nor has it thence hitherto had, any real estate; and all of the property of

your orator was on said day, and has thence hitherto been, and still is exempt by law from assessment and taxation.

That if deduction of all the property of your orator exempt from assessment and taxation as last aforesaid were made to each stockholder in assessing said stock, there would remain nothing of value subject to assessment; and that the pretended assessment of said shares at said value of $113 per share will be based wholly upon supposed and fictitious property, and upon property exempt by the constitution and laws of the United States from assessment and taxation.

13.

That in and by said section 3610 of said Political Code it is provided that in case the tax on any stock in a national bank is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor, and the Assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien prior to all other liens on said stock and the dividends and earnings thereof, for the reimbursement to it of the taxes so paid.

That the ownership of the shares of capital stock of your orator, or of any of them, may be and does change by endorsement and transfer of the certificate or certificates evidencing and representing any given number of such shares without there being any change in the name or names in which the said certificate or certificates stand on the books of your orator.

That while the stock of your orator on the first Monday of March, A. D. 1900, at noon of that day, may have been owned as the same appears upon the books of your orator and as the names of the owners thereof appear in the list of stockholders kept by your orator as hereinbefore alleged, yet intermediate that day and the day when the defendant, as Assessor as aforesaid, may call upon and demand payment from your orator of the tax to be levied thereon upon said assessment, the ownership of said stock may have wholly changed so that while your orator may have known who the owners of the same were on the first Monday of March, A. D. 1900, at noon of that day, yet at the time a demand upon your orator for payment of said tax by said defendant is made, your orator may be wholly unable to discover who will be the owners of the same, or to whose account the amount of tax so paid will or can be charged, and such owners may by that time have altogether ceased to have any account with your orator, or to hold or own any of the stock of your orator, and there may be neither stock nor dividends from which your orator can deduct or withhold payment of the amount of said tax in case it pay the same.

That, should your orator be compelled by said defendant, as Assessor, to pay said tax upon the stock of its stockholders as aforesaid, it would be impossible for your orator to charge the amount of said tax to the account of the various stockholders owning said stock, inasmuch as your orator may be wholly unable to know who were the real owners of such shares of stock or any of them, or who

or what stockholders were legally liable for the amount of such tax, by reason whereof the amount of the same would be irretrievably lost to your orator.

That if your orator shall pay the amount of said tax so as aforesaid to be levied, imposed and demanded by said defendant as aforesaid, and should attempt to charge the proportionate amount thereof to the persons in whose names the said shares of stock stood on said first Monday of March, A. D. 1900, to wit, March 5th, 1900, at noon on that day, or at any other time, on the books of your orator, according to the number of shares standing in its name, your orator would be subjected to and would be harassed by a great multiplicity of suits by and on behalf and at the instance of the several shareholders of your orator. And in this behalf your orator shows that any one or more of such stockholders would have the right of resisting and contesting the payment of any tax on any share or shares of the capital stock of your orator owned by such shareholder or shareholders, and would have the right to show that at 12 o'clock noon of said first Monday of March, A. D. 1900, he was not legally liable therefor, and that your orator had made payment of the same in its own wrong, in case it should have paid the same, and in case it should result that your orator made illegal payment of the same such illegal payment would constitute a breach of trust and illegal diversion of the corporate assets of your orator from the trust upon which it holds the same for the benefit of its creditors and shareholders.

14.

That the threatened seizure and sale by said defendant, as Assessor as aforesaid, of the personal property of and belonging to your orator, sufficient to raise the amount necessary to pay said sum of $22,642.47, will, unless restrained by this Honorable Court, deprive your orator of its property without due process of law; and said pretended assessment and taxation and threatened seizure and sale are and will be contrary to and in violation of and repugnant to the rights and privileges of your orator under the provisions of the constitution and laws of the United States and under the provisions of the constitution and laws of the State of California, and particularly under the provisions of section 1 of article XIV of the Amendments of the Constitution of the United States, and under the provisions of the act of Congress of the United States known as the National Bank Act and under the provisions of section 1 of article XIII of the Constitution of the State of California.

And that said act of the Legislature of the State of California of March 14th, 1899, under and pursuant to which said defendant is claiming to act and is acting in threatening to make said pretended assessment and taxation and in threatening to make said seizure and sale, is repugnant to and in violation of the rights and privileges of your orator under the provisions of the Constitution and laws of the United States, and particularly under the provisions of section 1 of article XIV of the Amendments of the Constitution of the United States and un-

der the provisions of the act of Congress of the United States known as the National Bank Act, and under the provisions of section 1977 of Revised Statutes of the United States.

That if the provisions of said act of the legislature of March 14th, 1899, were constitutional and legally valid, your orator would thereunder only be protected in paying the delinquent tax of the stockholder who owned stock of your orator at 12 o'clock noon on said first Monday of March, A. D. 1900, and who did not own real estate to secure payment of the same, and would not be protected in paying said tax or any part thereof where such stock had theretofore actually changed in ownership and become the property of person or persons other and different from those persons really owning it at 12 o'clock noon of said first Monday of March, A. D. 1900, or who at that time might own real estate to secure payment of the tax upon said stock, ownership whereof was unknown to your orator at the time of making such payment. By reason of all of which your orator would be involved in great doubt and uncertainty as to its rights and duties in the premises, and exposed to the possibility of a great multiplicity of litigation, to the loss and detriment of all nondelinquent stockholders of your orator, as all such litigation must necessarily tend to diminish the funds of your orator to the loss and detriment of those rightfully and beneficially entitled thereto and therein.

15.

That this is a suit in equity of a civil nature, and that the matter in dispute exceeds, exclusive of interest and

costs, the sum or value of $5,000, to wit, the sum of $22,000 and upwards as hereinbefore alleged; and that this case is a suit arising under the constitution and laws of the United States, to wit, under the provisions of section 1 of article XIV of the Amendments of the Constitution of the United States and under the provisions of the act of the Congress of the United States known as the National Bank Act, and particularly under the provisions of section 5219 and section 1977 of the Revised Statutes of the United States.

16.

Your orator further shows that only in and under the process of this Honorable Court as a Court of Equity can it have relief or protection from the great multiplicity of suits at law or in equity to which it may be subjected by seizure and sale of any of its property in payment or satisfaction of the tax threatened to be collected by the threatened assessment said defendant, as Assessor as aforesaid, threatens to make, as hereinbefore alleged, collection and payment, of which said defendant gives out and threatens to make as hereinbefore stated.

In consideration whereof and forasmuch as your orator is remediless in the premises under the strict rules of the common law, and can have adequate relief only in a Court of Equity, where matters of this sort are properly cognizable and relievable, your orator prays that an injunction may issue out of this Court restraining and enjoining said defendant, as Assessor as aforesaid, and his successors, from making said threatened assessment and tax upon the

shares of the capital stock of your orator, and from listing in the assessment book prepared or to be prepared by the defendant for the fiscal year ending June 30th, 1901, or from listing in any other manner or at all in the said assessment book the or any of the shares of the capital stock of your orator, and from making the said threatened seizure and sale of the property of your orator, or from in any manner interfering with the said shares of the capital stock, or with the property of your orator, or from instituting any suit or suits, action or actions, against your orator for the collection of any taxes claimed to be due upon any of the shares of stock of your orator, and your orator prays that in the meantime and until the hearing hereof a preliminary restraining order and injunction pendente lite embracing all of the relief herein prayed for issue out of this Honorable Court directed to the said defendant, such preliminary restraining order and injunction to continue in force until the determination of the final hearing herein, and that, upon the final hearing of this cause, this Court do adjudge and declare said threatened assessment and all action thereunder, and the said statute under which said defendant threatens to make said assessment, illegal and void, and forever enjoin said defendant from making said threatened assessment, and that your orator may have all the injunctions herein prayed for made perpetual, and that your orator may have such other and further relief as this cause may require, as well as its costs.

May it please your Honors to grant unto your orator a writ or writs of subpoena, to be issued out of and under the Seal of this Honorable Court, and directed to the said defendant, Washington Dodge, as Assessor of the said City and County of San Francisco, commanding the said defendant to appear in this cause at some day certain to be named therein and to answer in the premises, but not under oath, answer under oath being expressly waived, and to abide by and perform such decree as may be rendered herein.

NEVADA NATIONAL BANK OF SAN FRANCISCO,

[Corporate Seal] By ISAIAS W. HELLMAN,
President.

By GEO. GRANT,
Secretary.

T. I. BERGIN,
Solicitor for Complainant.

City and County of San Francisco,
Northern District of California. } ss.

George Grant, being duly sworn, says: That he is cashier and secretary of the Nevada National Bank of San Francisco, the complainant in the above-entitled cause; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated upon information and belief, and as to those matters that he believes it to be true. That the seal of said complainant, thereunto set is its true corporate

seal, and has been thereunto set by the authority and direction of the said complainant.

GEO. GRANT,

Cashier and Secretary.

Subscribed and sworn to before me this 25th day of April, A. D. 1900.

[Notary's Seal] HOLLAND SMITH,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 25th, 1900. Southard Hoffman, Clerk.

Subpoena ad Respondendum.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

IN EQUITY.

The President of the United States of America, Greeting; to Washington Dodge, as Assessor of the City and County of San Francisco, State of California.

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in San Francisco, on the fourth day of June, A. D. 1900, to answer a bill of complaint exhibited against you in said court by The Nevada National Bank of San Francisco, a national banking association organized and existing under and by virtue of the laws of the United

State, and to do and receive what the Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 25th day of April, in the year of our Lord, one thousand nine hundred, and of our Independence the 124th.

[Seal] SOUTHARD HOFFMAN,
Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice, for the Courts of Equity of the United States.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of June next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

SOUTHARD HOFFMAN,
Clerk.

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 25th day of April, 1900, and personally served the same on the 25th day of April, 1900, on Washington Dodge, as Assessor of the City and County of San Francisco, State of California, by delivering to and leaving with Washington Dodge, as Assessor of the City and County of San Francisco, State of California, said defendant named therein, at the City and County of San Francisco, in said District, an attested copy thereof, together with a certified

copy of the bill of complaint certified to by the clerk of the court.

San Francisco, April 25th, 1900.

JOHN H. SHINE,
United States Marshal.
By S. P. Monckton,
Office Deputy.

[Endorsed]: Filed April 26, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of San Francisco, State of California,
Respondent.

Answer to Bill of Complaint.

The answer of Washington Dodge, as Assessor of the City and County of San Francisco, State of California, respondent, in the bill of complaint, entitled The Nevada National Bank of San Francisco, complainant against Washington Dodge, as Assessor of the City and County of San Francisco, respondent.

This respondent, now and at all times hereafter saving to himself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill of complaint contained, for answer thereto, or to so much thereof as this respondent is advised it is material or necessary for him to make answer to, answering says:

I.

And admits the facts alleged in paragraph "First" of complainant's bill of complaint.

II.

And admits the facts alleged in paragraph "Second" of complainant's bill of complaint.

III.

And admits the facts alleged in paragraph "Third" of complainant's bill of complaint.

IV.

And admits and alleges that under and by virtue of the laws of the State of California all property, not exempt from taxation under the laws of the United States nor under the laws of the State of California belonging to, owned by, claimed by, in the possession or under the control of any person at twelve o'clock M. on the first Monday in March, in each year, is subject to assessment and taxation, and liable to be assessed and taxed, as by the laws of the State of California provided for the fiscal year ending on the 30th day of June of the next succeeding year.

V.

And admits the facts alleged in paragraph "Fifth" of complainant's bill of complaint.

VI.

And admits the facts alleged in paragraph "Sixth" of complainant's bill of complaint.

VII.

And admits the facts alleged in paragraph "Seventh" of complainant's bill of complaint.

VIII.

And respondent admits that on the first Monday in March, 1900, at 12 o'clock M. of said day, complainant owned and held the following personal property; $2,070,000, of the bonds of the United States; the premium on said bonds having on said day and at said time been the sum of $265,284.05, making the said $2,070,000, of United States bonds with the premium thereon equal to the sum of $2,335,284.05; $2,276,917, in cash; but respondent denies that all of said hereinbefore enumerated property, or any thereof, is exempt from assessment or taxation under the laws of the United States or of the State of California; and respondent alleges that he has no information or belief upon the subject sufficient to enable him to answer and basing his denial on that ground denies that said property was or is all of the assets or property owned, or held by complainant at 12 o'clock M. of the 5th day of March, 1900.

IX.

And respondent admits the further facts alleged in paragraph "9" of complainant's bill of complaint, saving and excepting that respondent denies that the United States bonds held by complainant, or the premium thereon, or the cash on hand, at 12 o'clock M. of the first Monday in March, 1900, or either or any thereof, are or were exempt under the laws of the United States, or of the State of California, or otherwise, or at all, from assessment or taxation.

And respondent alleges he has no information or belief upon the subject sufficient to enable him to answer, and basing his denial on that ground denies that on said first Monday in March, 1900, at noon of said day, complainant held or owned $963,099.88 of bonds of corporations organized or acting under the laws of the State of California, for the purpose of constructing, owning or operating railroads, or other bonds of a miscellaneous character, and respondent denies that such bonds, or any of them, on the day or year last mentioned, as the corporate property of complainant, were or still are exempt under the laws of the United States or of the State of California; denies that the stock of complainant on said first Monday in March, 1900, was not listed upon said Stock and Bond Exchange, or had not been for nearly a year prior thereto.

X.

And respondent admits, that unless restrained by this Honorable Court, in making the assessment of the capital

stock of complainant, he will make the same in the manner following, that is to say; he will make allowance by deduction as follows:

(1) For United States bonds....	$2,142,400
(2) For fixtures....	3,450
(3) Taxes.....	582
(4) Expenses.....	16,240
Total deductions....	$2,162,672

Which last-named sum he will divide by 30,000 shares of the capital stock of complainant, leaving $72.08 as the amount of deduction upon each share of the capital stock of complainant.

And respondent admits that the value of the capital stock of complainant is the sum of $185 per share and the same will be assessed at said valuation; from which he will deduct the sum of $72.08, leaving the difference of $112.92, which, for the purposes of assessment and taxation, he will treat as the assessable value of each share of the capital stock of complainant.

But respondent denies that, in ascertaining or determining the value of the capital stock of complainant at $185 per share he will ascertain or determine the same exclusively from the report thereof made in said Stock and Bond Exchange as hereinbefore stated, and in this behalf respondent alleges that he will ascertain and determine the market value of each share of the capital stock of complainant by considering the market value thereof as bought and sold and quoted on said Stock and Bond Ex-

change, on the first Monday in March, 1900, at 12 o'clock of said day, and by estimating and considering the dividends said stock was on said day and time paying to the owners and holders thereof, by considering the sworn statements made by the duly authorized officers of complainant to the Controller of Currency of the United States, and by considering the general reputation of the officers and manager of complainant and of complainant as bank and bankers.

And respondent admits that in making an assessment of the shares of the capital he will exclude from the amount of exemption the sum of $265,284.05, the amount of the premium upon said U. S. Bonds, but respondent denies that he claims or insists, or has at any time or at all claimed or insisted that said U. S. bonds, or any thereof, are exempt or not liable to assessment or taxation.

And respondent admits in ascertaining the market value of said stock, the market value of said bonds will be taken into account, including the premium thereof, and that in ascertaining the amount of deductions to which the stock of complainant is or will be entitled in making such assessment, the amount of said premiums will not be deducted.

And respondent admits that in making such assessment he will not exclude from consideration or from constituting an element of the amount of such assessment the corporate property of complainant, except real estate and mortgages.

XI.

And respondent denies the facts alleged in paragraph "Eleventh" of complainant's bill of complaint to and including lines 27, page 15 thereof, and each and all of them.

And respondent denies that such assessment and taxation upon the shares of the capital stock of complainant would, or will be in violation of, or repugnant to, or in violation of and repugnant to the provisions of section 5219 of the Revised Statutes of the United States, or any statute, in that such taxation would or will be at a greater rate than would or will, be assessed upon other moneyed capital in the hands of individual citizens in the State of California. And respondent denies that, in assessing and taxing the shares of the capital stock of complainant, no deduction would or will or can legally be made from the valuation of shares, or any of them, of debts unsecured by deed of trust, mortgage, or other lien on real or personal property due or owing by the stockholders of complainant, or by any of them, to bona fide residents of the State of California; and in this behalf respondent alleges, that unless restrained from making an assessment of the shares of the capital stock of complainant, by order of this Honorable Court, he will, in making such assessment, permit to be made and make a deduction from the valuation of such shares, and of each and all of them, of debts unsecured by deed of trust, mortgage or other lien on real or personal property, due or owing by the holders of such shares to bona fide residents of the State of California; alleges that heretofore, to wit, on or about the

23d day of March, 1900, respondent caused to be addressed and mailed to the stockholders of complainant, and to each of them, who owned, claimed, possessed or controlled any shares of the capital stock of complainant at 12 o'clock M. of the first Monday in March, 1900, a written notice, notifying such stockholders, and each and all of them, of the intention of respondent to assess such stock to such shareholders, and requesting them to call at the office of respondent, in the City Hall, in the City and County of San Francisco, State of California, and present such unsecured debts, due or owing to bona fide residents of the State of California or other exemptions, as they might have, and which, under the laws of the United States and of the State of California, are deductible from valuation of such shares of stock, that he might permit and make such deductions alleges that, in response to such notice and invitation numerous stockholders of complainant's capital stock have made return, as required and permitted by section 3629 of the Political Code of unsecured debts owned by them on the 5th day of March, 1900, at 12 o'clock M. due and owing to bona fide residents of the State of California, and have requested that such unsecured debts be deducted from that valuation of the shares of stock of complainant, which said deductions respondent is prepared to, and will unless restrained by order of this Honorable Court, make and allow from the valuation of said shares of stock.

And respondent alleges that he has no information or belief upon the subject sufficient to enable him to answer

and basing his denial on that ground denies that the amount of moneyed capital in the City and County of San Francisco, State of California, on the first Monday in March, 1900, at noon of said day, invested by banks and bankers, having their principal place of business in said City and County, or residents therein, is unsecured solvent credits, or from which, under the Constitution and laws of this State unsecured debts can be deducted, was or is the sum of $14,074,561; or any other sum, or any part thereof; denies that on the day and year last aforesaid the amount of moneyed capital in the State of California other than in the City and County of San Francisco invested by banks or bankers in unsecured solvent credits, or from which, under the Constitution and laws of the State of California unsecured debts can be deducted, or otherwise, was the sum of $7,589,302, or any other sum, or any part thereof; denies that on the day and year last aforesaid, said banks and bankers, at the City and County of San Francisco, had debts unsecured by trust deed, mortgage or other lien on real estate or personal property, owing by such banks or bankers in said City and County of San Francisco amounting to the sum of $36,710,062, or any other amount, or any part thereof; denies that on said day last aforesaid the amount of debts unsecured by trust deed, mortgage or lien on real or personal property, owing by said banks or bankers, or otherwise, in the State of California, other than in the City and County of San Francisco, was the sum of $32,400,304, or any other sum, or any part thereof; and respondent denies that the amount of

moneyed capital invested in such solvent credits by such banks or bankers on the day and year last aforesaid in the City and County of San Francisco or in the State of California as compared with the amount of moneyed capital invested in the shares of the capital stock of complainant, or otherwise, or at all, is so large and substantial, or large and substantial, that the assessment or taxation of the shares of the capital stock of complainant without deduction therefrom, or without being able to deduct therefrom, debts unsecured by trust deed, mortgage, or other lien on real or personal property, as may have been owing by the respective holders of the shares of the capital stock of complainant on the day and year last aforesaid, would or will be an illegal or unjust, or illegal and unjust or any discrimination at all against the owners or holders of the shares of the capital stock of complainant or would or will make the taxation of said shares of stock, or any of them, at a greater rate or at any rate other than is imposed upon other moneyed capital in the hands of individual citizens in the State of California, or particularly in the City and County of San Francisco, State of California. And respondent denies that the solvent credits hereinbefore referred to or any solvent credits so held as aforesaid by the banks or bankers in the City and County of San Francisco or in the State of California, are moneyed capital in the hands of individual citizens of the State of California which enter into competition for business, or otherwise, with complainant.

And in this behalf respondent is informed and believes

and upon such information and belief alleges the fact to be that the paid-up capital of Commercial Bank and Trust Companies engaged in the business of banking in the City and County of San Francisco, State of California, was on the first Monday in March, 1900, at 12 o'clock M. of said day, ever since has been, and now is the sum of $9,899,615 and no more and that the reserve fund, undivided profits and surplus fund of said Commercial Banks and Trust Companies on the day and year last aforesaid aggregated the sum of $10,444,447 and no more, making a total of $20,344,062; that the market value of the shares of the capital stock of said Commercial Banks and Trust Companies, as bought and sold on the Stock and Bond Exchange, and in open market on the day and year last aforesaid was the sum of $23,325,246 and no more; that the said Commercial Banks and Trust Companies own and have invested in U. S. bonds and other property exempt from taxation under the laws of the United States, and of the State of California the aggregate sum of $15,109,422 and no more, that said banks and trust companies are or will be assessed for real and personal property, including solvent credits, owned, claimed, possessed or controlled by them on the first Monday in March, 1900, at 12 o'clock M. of said day, in the sum of $14,794,628 or more.

And in this behalf respondent further alleges that the Commercial Banks and Trust Companies, and such and all of them entering into competition for business with complainant in the City and County of San Francisco and in the State of California were or will be assessed and taxed

for the fiscal year ending June, 30, 1901, at as great or greater a rate than is or will be imposed or assessed upon the shares of the capital stock of complainant.

XII.

And respondent denies that in making said assessment of said shares of the capital stock of complainant he will not proceed in the manner directed by said act of the legislature of March 14, 1899, in this: that in making such assessment to each stockholder of complainant he will not deduct from the value of his share of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of the capital stock of complainant.

And respondent denies that on the first Monday in March, 1900, or at any time, all the property of complainant, except its real estate and mortgages, was on said day, or has thence hitherto been, or still is exempt by law from assessment or taxation and in this behalf respondent alleges the fact to be that the personal property and assets, and each and all thereof of complainant, were on said day and at said time, and ever since have been, and now are, constituent elements in the estimation and determination of the value of the shares of the capital stock of complainant, on account of which the shareholders of complainant are entitled to no deduction or deductions whatsoever.

And respondent denies that, if deduction of all the property of complainant exempt from assessment or taxation

were made to each shareholder in assessing said stock, there would remain anything of value subject to assessment, or that the assessment of said shares at said value of $112.92 per share, would or will be based wholly, or otherwise, or at all, upon the supposed or fictitious property, or upon property exempt by the Court or laws of the United States from assessment or taxation; and in this behalf respondent alleges that a full and entire deduction from the value of the shares of complainant will be permitted and made of the proportionate value per share of all property not included or permitted or required to be included by law in the estimation and determination of the value of the said shares, and of each of them, for purposes of assessment and taxation.

XIII.

And respondent admits that in and by section 3610 of said Political Code it is provided that in case the tax on any stock in a national bank is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall be liable therefor and the Assessor shall collect the same from said bank, which may charge the amount of the tax so collected on the account of the stockholders owning such stock; and shall have a lien prior to all other liens on said stock and the dividends and earnings thereof for the reimbursement of it of the taxes so paid. Admits that the ownership of the shares of the capital stock of complainant, or any of them, may and does change by the endorsement and transfer of the certificate representing a given number of said shares with-

out there being any change in the name or names in which the said certificate or certificates stand on the books of complainant. Admits that while the shares of stock of complainant on the first Monday in March, 1900, at noon of said day, may have been owned as the same appear upon the books of complainant or as the names of the owners thereof appear in the list of stockholders kept by complainant, yet intermediate that day and the day when respondent may call upon or demand payment of complainant of the taxes to be levied, should respondent ever call upon or demand payment of such taxes from complainant the ownership of said shares of stock may have been changed but respondent denies that, while complainant may have known who the owners of said shares of stock were on the first Monday in March, 1900, noon of that day, at the time a demand upon complainant for payment of such tax may be made, respondent may or will be wholly or otherwise unable to discover who are the owners of the same, or to whose account the amount of such tax so paid will or can be charged, and in this behalf respondent is informed and believes, and upon such information and belief charges the fact to be that the shares of the capital stock of complainant standing on the books of complainant in the names of certain persons as aforesaid, at 12 o'clock on the first Monday in March, 1900, were actually claimed, owned, belonging to, in the possession or under the control of such person or persons on said day and at said time, and that the same ever since that day and hour have been and now are owned, claimed, belonging to, in

the possession of, or under the control of the same person or persons in whose name or names the said shares appeared upon the books of complainant as aforesaid.

And respondent denies that should complainant be compelled to pay a or any tax upon the shareholders, as provided in section 3610 of the Political Code, it would be impossible for complainant to charge the amount of such tax to the accounts of the respective stockholders or any such shares of stock, inasmuch as complainant be wholly or otherwise, unable to know who were the real owners of such shares of stock, or any of them, or who or what shareholders were legally liable for the amount of such tax, and denies that by reason of any such payment such tax or any part thereof, would be irretrievably, or otherwise, or at all, lost to complainant.

And respondent denies that, if complainant should pay the amount of such tax and should attempt to charge the proportionate amount thereof to the persons in whose names the said shares of stock stood on the first Monday in March, 1900, at noon of said day or at any other time, on the books of complainant, according to the number of shares standing in the name of each person, complainant would be subjected to or would be harassed by a great or any multiplicity of suits, or by any suits whatsoever, by or on behalf or at the instance of several or any stockholders of complainant. And respondent denies that any one or more of said stockholders, would have the right of resisting or contesting the payment of any tax on any share or shares of the capital stock of complainant owned by

such stockholders, or would have the right to show that at 12 o'clock M. of the first Monday in March, 1900, he was not legally liable therefor, or that complainant had made payment of said tax in its wrong, or otherwise, in the case it should pay the same; denies that in that case it would result that complainant had made illegal payment of said tax such illegal payment would constitute a breach of trust or illegal division of the corporate assets of complainant from the trust upon which it holds the same for the benefit of its creditors, or stockholders.

XIV.

And respondent denies that he has threatened the seizure or sale, or does now threaten the seizure or sale of any personal or other property belonging to complainant sufficient to raise the sum of $22,642.47 or any other sum, or any part thereof, and denies if such seizure or sale should be made such seizure or sale would deprive complainant of its property without due process of law; and respondent denies that such seizure or sale would be contrary to or in violation or repugnant to the rights or privileges of complainant under or pursuant to the provisions of the Constitution or laws of the United States, or under or pursuant to, the provisions of the Constitution or the laws of the State of California, or particularly under or pursuant to the provisions of section 1, article XIV of the Constitution of the United States, known as the National Bank Act, or under or pursuant to the provisions of section 1, of article XIII of the Constitution of the State of California; or under or pursuant to the provisions of section 3608

of the Political Code of the State of California, as the same existed at 12 o'clock M., on the first Monday in March, 1900, or that the act of the legislature of the State of California of March 14, 1899, under and pursuant to which respondent might act in making said assessment and taxation or making said assessment or taxation or making such seizure or sale, is in violation of or repugnant to the rights or privileges of complainant under or pursuant to the provisions of the Constitution or laws of the United States, or particularly under or pursuant to the provisions of section 1, article XIV of the Constitution of the United States, or under or pursuant to the provisions of the act of Congress of the United States known as the National Bank Act, or any or all of such laws, constitutions, or provisions, or otherwise, or at all.

And respondent denies that, under the provisions of said Act of March 14, 1899, complainant would be protected only in paying the taxes of the stockholder or stockholders who owned stock of complainant at 12 o'clock M. on the first Monday in March, 1900, and who did not own real estate to secure the payment of the same, or would not be protected in paying said tax, or any part thereof, at the time of such payment by complainant, such shares had theretofore actually changed in ownership and had become the property of any person or persons other than or different from those persons owning it at 12 o'clock M. of the said first Monday in March, 1900, or had become the property of any person or persons who at the time of such payment by complainant might own

real estate to secure the payment of the tax on such shares of stock. And respondent denies that by reason of all or any such supposed or pretended facts complainant would be involved in great or any doubt or uncertainty as to its rights or duties in the premises or otherwise, or would be exposed to a great or any multiplicity of litigation, or any litigation, to the loss or detriment, or other wise, of all or any nondelinquent stockholders of complainant.

XV.

And respondent denies that this is a suit in equity of a civil nature and in this behalf respondent alleges that the subject matter of said bill of complaint is not within the jurisdiction of a court of equity or cognizable therein.

XVI.

And respondent further submits to this Honorable Court that complainant has a full, complete, speedy and adequate remedy at law against respondent for all causes of action or causes of actions, stated or attempted to be stated in complainant's bill of complaint on file in this action; and he here claims the same benefits of the objection as if he had not demurred to the relief so sought.

Wherefore, this respondent having fully answered, confessed, traversed, and avoided and denied all the matters in the said bill of complaint material to be answered according to his best knowledge and belief, humbly prays this Honorable Court to enter its decree, that the respondent be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained, and for

such further and other relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

WASHINGTON DODGE, .

Assessor of the City and County of San Francisco, Respondent.

FRANKLIN K. LANE,
Solicitor for Respondent.

I hereby certify that in my opinion the foregoing answer is well founded in point of law.

W. I. BROBECK,
Of Counsel for Respondent.

State of California,
City and County of San Francisco. } ss.

Washington Dodge, as Assessor of the City and County of San Francisco, State of California, respondent in the above entitled proceeding being first duly sworn says: That he is the respondent in the above-entitled action, that he has read the foregoing answer in said action, and knows the contents thereof, and that the same is true of his knowledge, except as to the matters which are therein on his information or belief, and as to those matters that he believes it to be true.

WASHINGTON DODGE.

Subscribed and sworn to before me this 2d day of June, 1900.

J. M. SEAWELL,
Judge of the Superior Court of the City and County of San Francisco, State of California.

[Endorsed]: Service by copy of within original is hereby admitted this 3d day of June, A. D. 1900.

T. I. BERGIN,
Solicitor for Complainant.

Filed June 4th, 1900. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,

vs.

WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California,
Defendant.

No. 12,927.

Replication.

The replication of the Nevada National Bank of San Francisco, complainant in the above-entitled cause:

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the answer of the defendant in the above-entitled cause, for replication thereunto saith:

That it will aver and prove its said bill in the above-entitled cause to be true, certain and sufficient in law to

be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true, all of which matters and things this repliant is and will be ready to aver and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it has already prayed.

T. I. BERGIN,
Solicitor for Complainant.

T. I. BERGIN,
Of Counsel for Complainant.

[Endorsed]: Received copy of the within replication this June ——, 1900.

FRANKLIN K. LANE,
Solicitor for Defendant.

Filed June 11th, 1900. Southard Hoffman, Clerk.

At a stated term, to wit, the March term, A. D. 1900, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday the 2d day of July, in the year of our Lord one thousand nine hundred. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

NEVADA NATIONAL BANK OF SAN FRANCISCO,

vs.

WASHINGTON DODGE, Assessor, etc. } No. 12,927.

Order Allowing Complainant to File Supplemental Bill.

Upon motion of T. I. Bergin, Esq., counsel for complainant herein, it was ordered that complainant be and he hereby is allowed to file a supplemental bill herein, and that upon complainant executing and filing a bond in double the amount the defendant is charged in said bill with seeking to collect from complainant, a temporary restraining order issue enjoining defendant from making the collection threatened, and that an order issue directing defendant to show cause why an injunction pendente lite should not issue herein.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,

vs.

WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California,
Defendant.

Supplemental Bill.

To the Judges of the Circuit Court of the United States for the Northern District of California, in the Ninth Circuit, Sitting in Equity:

The Nevada National Bank of San Francisco, a national banking association, complainant in the above-entitled cause, respectfully shows to the Court that on April 25th, A. D. 1900, it filed its duly verified bill of complaint in equity in the above-entitled Court against Washington Dodge, as Assessor of the City and County of San Francisco, State of California, wherein it did set forth:

1.

That on January 1st, A. D. 1898, your orator was, and at all times thence hitherto has been, and still is, a

national banking association, organized and existing under and by virtue of the laws of the United States, for carrying on the business of banking, as provided for and authorized by the provisions of the statutes of the United States in this behalf, with a capital stock of three millions of dollars, divided into thirty thousand shares of stock of the par value of one hundred dollars to each share; that the place where its banking-house and its operations of discount and deposit were and are carried on and its general business conducted, as authorized and provided for in its articles of association, is the City and County of San Francisco, State of California, where it has been and is doing business in this State, and where it has its principal place of business in this State.

2.

That Washington Dodge, the defendant above named, was, on January 1st, A. D. 1899, thence hitherto has been, and still is, the duly elected, qualified and acting Assessor of the City and County of San Francisco, State of California, and was and is a citizen of the State of California and a resident and inhabitant of said Northern District of California, and was and is the person and officer under and by virtue of the laws of the State of California authorized, as hereinafter more particularly set out, to assess taxes for and in the City and County of San Francisco.

3.

That by an act of the legislature of the State of California, approved March 7, 1881, entitled "An act to amend the Political Code of the State of California relating

to Revenue, by adding a new section to be known as section 3608 of said Code, and by amending sections 3607, 3617, 3627, 3629, 3650 and 3651 and 3652 of said code, and by repealing section 3640 of said code, all relative to revenue"—there was, among other things, on said 7th day of March, 1881, added to the Political Code of said State of California a new section numbered 3608, in the words and figures following, to wit:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares, and also of the corporate property, would be double taxation. Therefore, all property belonging to corporations shall be assessed and taxed, but no assessment shall be made on shares of stock, nor shall any holder thereof be taxed therefor."

That by an act of the legislature enacted on the 14th day of March, 1899, entitled "An act to amend Section 3608 of the Political Code of the State of California relating to the general revenue of the State and to property liable to taxation for the purpose of revenue, and to add new sections to be known as sections 3609 and 3610, and also relating to the general revenue of the State and to property liable to taxation for the purpose of revenue," said section 3608 was, on said 14th day of March, 1899, amended so as to read as follows:

"3608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and repre-

sent, and the assessment and taxation of such shares and also all the corporate property would be double taxation. Therefor, all property belonging to corporations, save and except the property of national banking associations, not assessable by federal statute, shall be assessed and taxed, but no assessment shall be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by federal statute."

That by said act of March 14th, 1899, there were on said 14th day of March, A. D. 1899, added to the said Political Code of the State of California, two new sections numbered respectively 3609 and 3610, and being respectively in the words and figures following, to wit:

"3609. The stockholders in every national banking association doing business in this State, and having its principal place of business located in this State, shall be assessed and taxed on the value of their shares of stock therein; and said shares shall be valued and assessed as is other property for taxation, and shall be included in the valuation of the personal property of such stockholders in the assessment of the taxes at the place, city, town, and county where such national banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town, or county, or not; but in the assessment of such shares, each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits, in the same manner as such deductions are allowed by the pro-

vision of paragraph six of section thirty-six hundred and twenty-nine of the Political Code of the State of California. In making such assessment to each stockholder there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of capital stock in said national bank. And nothing herein shall be construed to exempt the real estate of such national bank from taxation. And the assessment and taxation of such shares of stock in said national banking associations shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State."

"3610. The Assessor charged by law with the assessment of said shares shall, within ten days after he has made such assessment, give written notice to each national banking association of such assessment of the shares of its respective shareholders; and no personal or other notice to such shareholders of such assessment shall be necessary for the purpose of this act. And in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor; and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien, prior to all other liens, on his said stock, and the dividends and earnings thereof, for the reinbursement to it of such taxes so paid."

4.

That under and by virtue of the Constitution of the State of California all property not exempt from taxation under the laws of the United States and under the laws of the State of California, in the possession or under the control of any person, at 12 o'clock noon on the first Monday in March in each year, is subject to assessment and taxation as by the laws of said State of California provided for the fiscal year ending upon the 30th day of June of the next succeeding year, as hereinafter more particularly set out.

5.

That pursuant to the requirements of the Revised Statutes of the United States in that behalf, the president and cashier of your orator have at all times caused to be kept, and do now keep, in the office where the business of your orator is transacted, to wit, in said office in the City and County of San Francisco, a full and correct list of the names and residences of all of the shareholders of your orator, said list containing the number of shares held by each of said shareholders; that said list, during all of the times hereinafter mentioned has been, and is, during the business hours of each day in which business could have been or was legally transacted, subject to the inspection of said defendant; that on or about the 7th day of March, A. D. 1900, your orator, at the request of said defendant, gave and delivered to him a full and correct list of the names and residences of the shareholders of your orator, as the same appear on the full and correct list of share-

holders kept as aforesaid, showing the number of shares of its stock held by each of said shareholders, at 12 o'clock noon on the 5th day of March, A. D. 1900, said 5th day of March, A. D. 1900, being the first Monday in March, A. D. 1900; that the number of said shareholders at 12 o'clock noon on said first Monday in March, A. D. 1900, was two hundred and three (203).

6.

That under the provisions of the Constitution of the State of California the fiscal year in said State of California is from the first day of July of each year to the thirtieth day of June of the next succeeding year; and that, pursuant to the laws of said State, the Board of Supervisors of said City and County of San Francisco did, on September 18th, 1899, fix the rate of tax for said City and County for the fiscal year ending June 30th, 1900, at the rate of $1.029 on each $100 valuation of the taxable property upon the assessment books of said City and County for said fiscal year; and that the State Board of Equalization of said State of California, pursuant to the laws of the State of California in that behalf, at the time and in the manner provided therefor by law, did fix the rate of taxation for the fiscal year ending June 30th, 1900, on all property, both real and personal, in the City and County of San Francisco, at the rate of 60 cents and one mill on each $100 of valuation of said property for said fiscal year; and thereafter, to wit, on September 18th, A. D. 1899, said Boad of Supervisors of said City and

County of San Francisco did fix the rate of state taxation for the fiscal year ending June 30th, 1900, on all property of said City and County of San Francisco not exempt by law at the sum of 60 cents and one mill on each $100 valuation of said taxable property upon the assessment roll for said fiscal year; the combined rate of taxes for said fiscal year for State, city and county purposes amounting to the sum of $1.63 on each $100 valuation of taxable property in said City and County of San Francisco.

7.

That under and by virtue of the laws of said State of California every tax due upon personal property is a lien upon the real property of the owner of said personal property from and after 12 o'clock noon of the first Monday of March in the year; and that, under and pursuant to the laws of the State of California, the defendant claims the right when any taxes on personal property are not a lien upon real property sufficient to secure the payment thereof, to collect all such taxes between the first Monday in March and the third Monday in July of each year; and under said laws said defendant claims the power to make such collection by seizure and sale of any personal property owned by the person against whom such tax is assessed, said sale to be of an amount of such personal property sufficient to pay the taxes,the percentage thereon provided by law, and the costs of sale; and that, under and by virtue of said laws, said defendant is governed as to the amount of taxes to be collected on such personal

property by the State and city and county rate of taxation for the previous fiscal year.

8.

That said defendant, as Assessor as aforesaid, has notified and informed your orator that he, as such Assessor is about to assess, and your orator verily believes that, unless restrained by this Honorable Court, he will, under and by virtue of the aforesaid act of the legislature of March 14th, 1899, amending the provisions of the Political Code of said State of California as hereinbefore set forth, and not otherwise, assess the shares of the capital stock of your orator at a valuation of $113 per share for each and every share of the capital stock of your orator, and in case the tax on any of such stock is unsecured by real estate owned by the respective holders of such stock, then and in that event that he will collect, as provided in and by said section 3610 of said Political Code, the amount of such tax from your orator, at the hereinbefore alleged rate of taxation on the valuation of such shares. That the amount of such tax, at the rate of taxation for city, county and State purposes as aforesaid of $1.63 upon the $100 valuation of said stock as hereinbefore last stated, will amount to the sum of $1.8419 upon each share of said capital stock; that on said first Monday of March, A. D. 1900, the taxes upon 12,293 shares of said capital stock were, thence hitherto have been, and still are unsecured by real estate owned by the holders of such stock; that the taxes upon said 12,293 shares of stock at the aforesaid valuation thereof and at the rate of taxation thereon here-

inbefore alleged will be the sum of $22,642.47. And said defendant, as Assessor as aforesaid, has notified and informed and threatened your orator that said sum of $22,642.47 will be collectible from your orator, and that as such Assessor, he will enforce payment and collection thereof from your orator, unless restrained from so doing by this Honorable Court; and your orator verily believes that said defendant, as Assessor as aforesaid, unless restrained therefrom by this Honorable Court, will carry out and execute his aforesaid threats to make said assessment upon the capital stock of your orator as hereinbefore stated, and to enforce collection and payment of the tax thereon of and from your orator as hereinbefore stated.

9.

That on January 1st, A. D. 1900, and long prior thereto, and thence hitherto, there was and is an association doing business in said City and County of San Francisco and known as and called the Stock and Bond Exchange; that said association is composed of members, stockholders admitted thereto, and none others; that said association, during the several periods of time herein last before stated, had, and has, a place of business in said City and County of San Francisco, whereat are sold stocks, bonds, United States bonds, and securities, at the board sessions thereof; that the manner of making such sales is as follows, that is to say: in open session of said board, whereat, however, only members of said board are admitted, the caller of said board calls off a list of the names of the several bonds, stocks and securities designed to be

offered for sale, and as he so calls off the same such broker as may desire to buy or sell any of the same publicly announces the amount he is willing to bid or offer therefor per share and the number of shares that he is willing to take or sell; whereupon the offering and bidding brokers, having agreed upon a purchase or sale, as the case may be, said caller publicly announces the same, and thereupon the purchasing broker pays for and accepts the delivery of the stocks, bonds or securities so bought, and pays therefor according to the terms of his bid. That only such stocks of corporations are sold at said board as are what are technically called listed thereon or listed upon said board; that is to say, such corporations as desire to list their stocks for sale at said board pay said board the sum of $100 a year for so listing the same, which listing means that the stocks of the corporation so listed are regularly offered for sale at the official sales of said board, and only such stocks as are listed as aforesaid are offered for sale or sold at the official sales of said board, and only sales or offers for sale of such stocks are officially reported in the official report of the proceedings of said exchange; that where the stock of corporations is so listed, the sales or offers for sales thereof at said exchange are regularly reported from day to day in the official publication of the proceedings of said board, whether sales thereof actually take place or not; where sales thereof do not actually take place on the day the same are so reported, the rate of sale or offer for sale last actually had at said board is reported until such time from actual

sale or offer for sale of the same the price thereof may be changed. But the stocks of corporations not so listed thereon are never reported, and do not appear in said publication except where unofficial sale of the same may have been actually made after the regular sessions of said board.

That in making sales of stock in manner aforesaid, the value of the assets of the corporation whose stock may be sold or offered for sale constitutes a material inducement to the sale of the same, and in estimating such value, where the corporation holds United States bonds or other property or securities exempt from taxation, the market value of the same is taken into account, and not merely the face or par value of the same. That in making sales of stock in manner aforesaid, the prosperous condition and future prospects of the business of the corporation whose stock may be sold or offered for sale, as well as the known character of the management of the business for skill and ability are taken into account and form material elements in estimating the price of the stocks so sold and frequently the sale of stocks so sold and the price realized upon such sales are materially affected by combinations of purchasers or sellers at such sales formed for the purpose of depressing or raising the prices to be realized at such sales of said stocks; that while the value of the corporate assets of the corporation whose stock is thus sold or offered for sale constitutes a material inducement to such sales, the prices realized thereat are not exclusively based thereon, but in addition thereto are based upon

purely speculative and conjectural considerations without foundation in fact; that such market value of said bonds, stocks and other property fluctuates from day to day, sometimes amounting to a very large premium; that is to say, the premium upon stock is the amount of the market value thereof over and above the par or face value of the same, and the premium upon bonds is the market value of the same over and above the par or face value of the same.

That the aforesaid sales, made in manner aforesaid in the Stock and Bond Exchange aforesaid, are daily reported in a newspaper or periodical published twice a day under and by authority of the Stock and Bond Exchange aforesaid, and known as and called "The Stock and Bond Exchange"; that from the sales so made and reported in the Stock and Bond Exchange publication as aforesaid is ascertained the current market value of such stocks, bonds and securities as are offered for sale and sold as aforesaid. That on said first Monday of March, A. D. 1900, to wit, on March 5th, noon, A. D. 1900, your orator held and owned $2,070,000 of bonds of the United States, under the laws of the United States, and of the State of California exempt from assessment and taxation by the State of California; that on the day and year last aforesaid the premium on said $2,070,000 bonds was the sum of $265,284.05, making said $2,070,000 of United States bonds with the premium thereto epual to the sum of $2,335,284.05; that on said first Monday of March, A. D. 1900, to wit, on March 5th, noon, A. D. 1900, your orator held and owned

the sum of $2,276,917 in cash, exempt under the laws of the United States and of the State of California from assessment and taxation by the State of California; that on said first Monday of March, A. D. 1900, to wit, on March 5th, noon, A. D. 1900, your orator held and owned $963,099.88 of bonds of a miscellaneous character, to wit, bonds of corporations organized and acting under the laws of the State of California for the purpose of constructing, owning and operating railroads, and other bonds of a miscellaneous character, which bonds, on the day and year last named, as the corporate property of your orator, were and still are exempt under the laws of the United States and of the State of California from assessment and taxation by the State of California; that the stock of your orator on said first Monday of March, A. D. 1900, to wit, March 5th, A. D. 1900, was not listed upon said Stock and Bond Exchange, and had not been for nearly a year prior thereto; that on or about February 28th, A. D. 1900, an unofficial sale of the stock of your orator was reported in said official publication known as the Stock and Bond Exchange at $185 per share, since which time no sale of any of the stock of your orator has been reported in said publication, said "Stock and Bond Exchange."

10.

That your orator is informed by said defendant, and verily believes, and, upon and according to such information and belief, charges the fact to be that said defendant, unless restrained therefrom by this Honorable Court in making said assessment upon the shares of the capital

stock of your orator, will make the same in manner following, that is to say: he will make allowance for exemptions as follows, to wit:

(1)	For United States Bonds.....	$2,142,400.00
(2)	For Fixtures..	3,450.00
(3)	Taxes..	582.00
(4)	Expenses.....	16,240.00
	Total Exemptions.....	$2,162,672.00

Which last-named sum he will divide by 30,000 shares of the capital stock of your orator, leaving $72.08 as the amount of exemption upon each share of the capital stock of your orator.

That the value of the capital stock he will assess at $185 per share, from which he will deduct said $72.08, leaving the difference of $112.92 which, for the purposes of assessment, he will treat as $113, as the assessable value of each share of the capital stock of your orator.

That said defendant, as Assessor as aforesaid, in ascertaining and determining the value of the capital stock of your orator at $185 per share as aforesaid, will ascertain and determine the same exclusively from the report thereof made in said Stock and Bond Exchange on said February 28th as hereinbefore stated, and not otherwise.

That in making said assessment said defendant will exclude from the amount of exemptions aforesaid the sum of $265,284.05, the amount of the premium upon said United States bonds, claiming and insisting that while said United States bonds are exempt from and not liable

to assessment or taxation, the aforesaid premium thereon is liable to assessment and taxation.

That in ascertaining the market value of said stock in manner aforesaid, the market value of said bonds will be taken into account, including the premium thereof, but in ascertaining the amount of deductions to which the stock of your orator is and will be entitled in making said assessment, the amount of said premium will not be deducted.

That in making said assessment said defendant will exclude from the amount of exemptions to which your orator is and will be entitled as herein alleged, the aforesaid sum of $2,276,917, cash on hand, and also said sum of $963,099 of miscellaneous bonds, claiming and insisting that, although the same constitute part and parcel of the corporate property of your orator, the same nevertheless is not and will not be exempt from assessment and taxation under the laws of the United States and the State of California.

That in making said assessment said defendant, as Assessor as aforesaid, will not exclude from consideration and from constituting an element of the amount of such assessment the corporate property of your orator, except real estate, notwithstanding the same is and will be exempt under the Constitution and laws of the United States and of the State of California from assessment and taxation.

11.

That under the laws of the State of California all shares of stock in corporations organized under the laws

of said State are exempt from taxation, save and except of national bank associations, whose property, other than real estate, is by federal statute exempt from assessment and taxation.

That shares of stock of the par value of more than the sum of two hundred million dollars are so exempted.

That shares of stock of the par value of thirty-three millions and upwards of corporations organized and existing and doing business under the laws of the State of California in the business of banking are by law exempt from taxation, and said defendant, as Assessor as aforesaid, has not and will not assess the same to the owners and holders thereof, or otherwise, or at all, for the fiscal year ending June 30th, 1901, and does not intend to assess to the holders of such shares in such corporations the value of the same, or to collect from such shareholders any taxes on such shares or the value thereof, by reason whereof said assessment upon the capital stock of your orator, assessed as aforesaid, will be in violation of and repugnant to the provisions of sections 5219 and 1977 of the Revised Statutes of the United States in that said taxation is and will be at a greater rate than is or will be assessed upon other moneyed capital in the hands of individual citizens in said State of California for said last mentioned fiscal year.

And your orator further shows that the said pretended assessment and taxation, so to be made by said defendant upon the shares of the capital stock of your orator is and will be in violation of and repugnant to the provisions of

said section 5219 of the Revised Statutes of the United States in that said taxation is and will be at a greater rate than is or will be assessed upon other moneyed capital in the hands of individual citizens of said State of California.

And in that behalf your orator further shows that in assessing and taxing said shares of stock of your orator no deduction can legally be made from the valuation of said shares or of any of them for debts unsecured by deed of trust, mortgage, or other lien on real or personal property due or owing by the shareholders of your orator or any of them to bona fide residents of the State of California; and that, in assessing and taxing other moneyed capital in the form of solvent credits unsecured by deed of trust, mortgage, or other lien on real or personal property due or owing to or in the hands of individual citizens of said State of California, a deduction is and will be made from said credits under and by the laws of the State of California of the debts unsecured by trust deed, mortgage or other lien on real or personal property as may be owing by such individual citizens or any of them to bona fide residents of the State of California, and that said assessment and taxation of the shares of your orator is and will be unjust, unlawful and illegal, and will discriminate against and upon such shares and against and upon the persons owning and holding the same and compel them to sustain and bear more than their just share and burden of the taxes of said State of California.

And in this behalf your orator avers that it is informed

and believes, and upon such information and belief states the fact to be, that the amount of moneyed capital in the City and County of San Francisco, in said State, on the first Monday of March, A. D. 1900, to wit, on March 5th, 1900, at noon of said day, invested by banks and bankers having their principal place of business in said city and county, and residents therein, in unsecured, solvent credits, and from which, under the constitution and laws of said State, unsecured debts can be deducted was the sum of $14,074,561; and on the day and year last aforesaid the amount of moneyed capital in the State of California, other than in the said City and County of San Francisco, invested by banks and bankers in unsecured, solvent credits, and from which, under the constitution and laws of said State, unsecured debts can be deducted, was the sum of $7,589,302; that on the day and year last aforesaid said banks and bankers in said City and County of San Francisco had debts unsecured by trust deed, mortgage or other lien on real or personal property, owing by such banks and bankers in said city and county, amounting to the sum of $36,710,062; and that, on said day last aforesaid, the amount of debts unsecured by trust deed, mortgage or other lien on real or personal property owing by said banks and bankers in the State of California, other than in the said City and County of San Francisco, was the sum of $32,400,304; that the amount of moneyed capital invested in such solvent credits by such banks and bankers on the day and year last aforesaid, as compared with the amount of moneyed capital invested in the shares

of the capital stock of your orator is so large and substantial that the assessment and taxation of the shares of the capital stock of your orator without being able to deduct therefrom debts unsecured by trust deed, mortgage, or other lien, on real or personal property as may have been owing by the respective holders of the shares of the capital stock of your orator on the day and year last aforesaid, will be illegal and unjust discrimination against the owners and holders of the shares of the capital stock of your orator, and will make the taxation of such shares of stock at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens in the State of California, and particularly in the City and County of San Francisco, in said State.

12.

That in making said assessment of said shares of the capital stock of your orator, said defendant will not proceed in the manner directed by said act of the legislature of March 14th, 1899, in this; that in making such assessment to each stockholder of your orator he will not deduct from the value of his share of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of the capital stock of your orator.

That on the first Monday of March, A. D. 1900, to wit, on March 5th, 1900, your orator had not, nor has it thence hitherto had, any real estate; and all of the property of

your orator was on said day, and has thence hitherto been, and still is exempt by law from assessment and taxation.

That if deduction of all the property of your orator exempt from assessment and taxation as last aforesaid were made to each stockholder in assessing said stock, there would remain nothing of value subject to assessment; and that the pretended assessment of said shares at said value of $113 per share will be based wholly upon supposed and fictitious property, and upon property exempt by the Constitution and laws of the United States from assessment and taxation.

13.

That in and by said section 3610 of said Political Code it is provided that in case the tax on any stock in a national bank is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor, and the Assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien prior to all other liens on said stock and the dividends and earnings thereof, for the reimbursement to it of the taxes so paid.

That the ownership of the shares of capital stock of your orator, or of any of them, may be and does change by endorsement and transfer of the certificate or certificates evidencing and representing any given number of such shares without there being any change in the name

or names in which the said certificate or certificates stand on the books of your orator.

That while the stock of your orator on the first Monday of March, A. D. 1900, at noon of that day, may have been owned as the same appears upon the books of your orator and as the names of the owners thereof appear in the list of stockholders kept by your orator as hereinbefore alleged, yet intermediate that day and the day when the defendant, as Assessor as aforesaid, may call upon and demand payment from your orator of the tax to be levied thereon upon said assessment, the ownership of said stock may have wholly changed so that while your orator may have known who the owners of the same were on the first Monday of March, A. D. 1900, at noon of that day, yet at the time a demand upon your orator for payment of said tax by said defendant is made, your orator may be wholly unable to discover who will be the owners of the same, or to whose account the amount of tax so paid will or can be charged, and such owners may by that time have altogether ceased to have any account with your orator, or to hold or own any of the stock of your orator, and there may be neither stock nor dividends from which your orator can deduct or withhold payment of the amount of said tax in case it pay the same.

That, should your orator be compelled by said defendant, as Assessor, to pay said tax upon the stock of its stockholders as aforesaid, it would be impossible for your orator to charge the amount of said tax to the account of the various stockholders owning said stock, inasmuch as

your orator may be wholly unable to know who were the real owners of such shares of stock or any of them, or who or what stockholders were legally liable for the amount of such tax, by reason whereof the amount of the same would be irretrievably lost to your orator.

That if your orator shall pay the amount of said tax so as aforesaid to be levied, imposed and demanded by said defendant as aforesaid, and should attempt to charge the proportionate amount thereof to the persons in whose names the said shares of stock stood on said first Monday of March, A. D. 1900, to wit, March 5th, 1900, at noon on that day, or at any other time, on the books of your orator, according to the number of shares standing in its name, your orator would be subjected to and would be harassed by a great multiplicity of suits by and on behalf and at the instance of the several shareholders of your orator. And in this behalf your orator shows that any one or more of such stockholders would have the right of resisting and contesting the payment of any tax on any share or shares of the capital stock of your orator owned by such shareholder or shareholders, and would have the right to show that at 12 o'clock noon of said first Monday of March, A. D. 1900, he was not legally liable therefor, and that your orator had made payment of the same in its own wrong, in case it should have paid the same, and in case it should result that your orator made illegal payment of the same such illegal payment would constitute a breach of trust and illegal diversion of the corporate assets of your orator from the trust upon which it holds the same for the benefit of its creditors and shareholders.

14.

That the threatened seizure and sale by said defendant, as Assessor as aforesaid, of the personal property of and belonging to your orator, sufficient to raise the amount necessary to pay said sum of $22,642.47, will, unless restrained by this Honorable Court, deprive your orator of its property without due process of law; and said pretended assessment and taxation and threatened seizure and sale are and will be contrary to and in violation of and repugnant to the rights and privileges of your orator under the provisions of the constitution and laws of the United States and under the provisions of the Constitution and laws of the State of California, and particularly under the provisions of section 1 of article XIV of the Amendments of the Constitution of the United States, and under the provisions of the act of Congress of the United States known as the National Bank Act and under the provisions of section 1 of article XIII of the Constitution of the State of California.

And that said act of the legislature of the State of California of March 14th, 1899, under and pursuant to which said defendant is claiming to act and is acting in threatening to make said pretended assessment and taxation and in threatening to make said seizure and sale, is repugnant to and in violation of the rights and privileges of your orator under the provisions of the Constitution and laws of the United States, and particularly under the provisions of section 1 of article XIV of the Amendments of the Constitution of the United States and under

the provisions of the act of Congress of the United States known as the National Bank Act, and under the provisions of section 1977 of Revised Statutes of the United States.

That, if the provisions of said act of the legislature of March 14th, 1899, were constitutional and legally valid, your orator would thereunder only be protected in paying the delinquent tax of the stockholder who owned stock of your orator at 12 o'clock noon on said first Monday of March, A. D. 1900, and who did not own real estate to secure payment of the same, and would not be protected in paying said tax or any part thereof where such stock had theretofore actually changed in ownership and become the property of person or persons other and different from those persons really owning it at 12 o'clock noon of said first Monday of March, A. D. 1900, or who at that time might own real estate to secure payment of the tax upon said stock, ownership whereof was unknown to your orator at the time of making such payment. By reason of all of which your orator would be involved in great doubt and uncertainty as to its rights and duties in the premises, and exposed to the possibility of a great multiplicity of litigation, to the loss and detriment of all nondelinquent stockholders of your orator, as all such litigation must necessarily tend to diminish the funds of your orator to the loss and detriment of those rightfully and beneficially entitled thereto and therein.

15.

That this is a suit in equity of a civil nature, and that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $5,000, to wit, the sum of $22,000, and upwards as hereinbefore alleged; and that this case is a suit arising under the Constitution and laws of the United States, to wit, under the provisions of section 1 of article XIV of the Amendments of the Constitution of the United States and under the provisions of the act of the Congress of the United States known as the National Bank Act, and particularly under the provisions of section 5219 and section 1977 of the Revised Statutes of the United States.

16.

Your orator further shows that only in and under the process of this Honorable Court as a Court of Equity can it have relief or protection from the great multiplicity of suits at law or in equity to which it may be subjected by seizure and sale of any of its property in payment or satisfaction of the tax threatened to be collected by the threatened assessment said defendant, as Assessor as aforesaid, threatens to make, as hereinbefore alleged, collection and payment, of which said defendant gives out and threatenes to make as hereinbefore stated.

In consideration whereof and forasmuch as your orator is remediless in the premises under the strict rules of the common law, and can have adequate relief only in a Court of Equity where matters of this sort are properly cognizable and relievable, your orator prays that an injunction

may issue out of this Court restraining and enjoining said defendant, as Assessor as aforesaid, and his successors, from making said threatened assessment and tax upon the shares of the capital stock of your orator, and from listing in the assessment-book prepared or to be prepared by the defendant for the fiscal year ending June 30th, 1901, or from listing in any other manner or at all in the said assessment-book the or any of the shares of the capital stock of your orator, and from making the said threatened seizure and sale of the property of your orator, or from in any manner interfering with the said shares of the capital stock, or with the property of your orator, or from instituting any suit or suits, action or actions, against your orator for the collection of any taxes claimed to be due upon any of the shares of stock of your orator, and your orator prays that in the meantime and until the hearing hereof a preliminary restraining order and injunction pendente lite embracing all of the relief herein prayed for issue out of this Honorable Court directed to the said defendant, such preliminary restraining order and injunction to continue in force until the determination of the final hearing herein, and that, upon the final hearing of this cause, this Court do adjudge and declare said threatened assessment and all action thereunder, and the said statute under which said defendant threatens to make said assessment, illegal and void, and forever enjoin said defendant from making said threatened assessment, and that your orator may have all the injunctions herein prayed for made perpetual, and that your orator may have

such other and further relief as this cause may require, as well as its costs.

May it please your Honors to grant unto your orator a writ or writs of subpoena, to be issued out of and under the Seal of this Honorable Court, and directed to the said defendant, Washington Dodge, as Assessor of the said City and County of San Francisco, commanding the said defendant to appear in this cause at some day certain to be named therein and to answer in the premises, but not under oath, answer under oath being expressly waived, and to abide by and perform such decree as may be rendered herein.

That on April 25th, A. D. 1900, a subpoena in due form of law was issued upon said bill in equity and placed in the hands of the United States marshal of said District for service, who on the same day served the same upon the defendant therein, Washington Dodge, as Assessor of said City and County of San Francisco..

That on April 25th, A. D. 1900, the above-named Court made a restraining order now on file in said cause wherein and whereby it was ordered that Washington Dodge, as Assessor of the City and County of San Francisco, State of California, defendant in the above-entitled action, his agents, servants, and attorneys, and all persons acting by, through or under his authority do desist and refrain, and they are hereby restrained from making any assessment upon any of the capital stock of The Nevada National Bank of San Francisco, complainant in said action, for the fiscal year ending June 30th, A. D. 1901, and from

listing in the assessment-book prepared or to be prepared by you for the fiscal year ending June 30th, A. D. 1901, or otherwise, or in any manner or at all listing the or any of the shares of the capital stock of the complainant in said or in any assessment-book, and from making any assessment and tax upon the or any of the shares of the capital stock of the said Nevada National Bank of San Francisco for said last mentioned fiscal year, and from making any collection of any tax on any of the shares of the capital stock of The Nevada National Bank of San Francisco for the fiscal year ending June 30th, A. D. 1901, as alleged in said bill of complaint, and from seizing or selling any property of said complainant in the satisfaction of any tax upon any of the shares of the capital stock of The Nevada National Bank of San Francisco aforesaid based upon any assessment made or to be made by you for the fiscal year ending June 30th, A. D. 1901, and from instituting any suit or suits, action or actions, against said complainant for the collection of any of such tax, and from in any manner interfering with or molesting said complainant or disturbing it in the possession of its property for or by reason of your looking to the obtainment of payment or satisfaction of any tax upon any of the shares of its capital stock during the pendency of this action and until the further order of the Court, and at the same time in and by said order said Washington Dodge was required to show cause on May 7th, A. D. 1900, at 11 o'clock of that day, or as soon thereafter as counsel can be heard, at the courtroom of said Court, why an injunction pendente lite

should not be issued in the above-entitled cause restraining and enjoining said defendant as therein set forth, which restraining order and order to show cause were on the same day and year, to wit, on April 25th, A. D. 1900, duly served upon said Washington Dodge, as Assessor as aforesaid.

That thereafter, on June 4th, A. D. 1900, said defendant did file his answer therein, and thereafter, to wit, on June 11th, A. D. 1900, the complainant in said action did file its replication to the answer of the defendant therein, and thereafter said order to show cause regularly came on before the Court for hearing, and was thereupon submitted to the Court for decision, and afterwards, to wit, on June 25th, A. D. 1900, the Court did make its order wherein and whereby a preliminary injunction in said cause was denied and the pending restraining order was dissolved, without prejudice, however, to the right of the complainant upon a supplemental bill or other pleading to apply for an injunction if so advised to restrain the Assessor from collecting the tax after an assessment has been made, if one is made, and this order is made upon the condition that the complainant shall have the opportunity of making certain application to the Court before the collection of the tax is enforced or attempted to be enforced by the defendant.

That on June 30, A. D. 1900, said defendant, as Assessor of said City and County of San Francisco, did make his assessment of the aforesaid capital stock of your orator for the fiscal year in said bill of complaint alleged,

and the making whereof was sought to be restrained in and by said bill of complaint. That said assessment so actually made by said defendant is subject to the same objections in said bill alleged against the threatened assessment therein alleged, and said assessment so made is liable to all the legal objections in said bill of complaint alleged against the threatened assessment in said bill of complaint alleged, and your orator herein and hereby alleges that the assessment so made by said defendant is illegal, unconstitutional, and void for the reasons and in the respects in which in said bill the assessment therein mentioned as threatened to be made was and is alleged to be illegal, unconstitutional and void, and your orator prays that all and singular the averments in said bill of complaint contained in respect to the illegality and unconstitutionality of said threatened assessment may be deemed and taken to be herein repeated and alleged with respect to said assessment so actually made by said defendant with a like force and effect as if the averments in said bill contained in this behalf were herein repeated in full respect to said assessment so actually made.

That on June 30, A. D. 1900, said defendant, as Assessor of said City and County of San Francisco, informed and notified your orator that on Monday, July 2d, A. D. 1900, at one o'clock Meridian of that day, he, said defendant as Assessor of said City and County of San Francisco, would proceed to collect and enforce collection of the sum of $20,879.04 of and from your orator for taxes founded and based upon said assessment so actually made

by him as hereinbefore last stated upon the shares of the capital stock of your orator owned by the stockholders thereof as in said bill of complaint alleged, and your orator avers that unless restrained by the order of this Honorable Court said defendant, as Assessor as aforesaid, will on Monday, July 2d, A. D. 1900, or as soon thereafter as he can, proceed to collect and enforce collection of said sum of $20,879.04 of and from your orator for and in respect of and as taxes upon the shares of the capital stock of your orator as in said bill of complaint alleged, and will seize and sell the property of your orator therefor and otherwise enforce collection of the same unless restrained therefrom by this Honorable Court.

In consideration whereof, and forasmuch as your orator is remediless in the premises under the strict rules of the common law, and has no adequate relief only in this Honorable Court, where matters of this sort are properly cognizable and relievable, your orator prays that an injunction issue out of this Honorable Court restraining and enjoining said Washington Dodge, as Assessor of said City and County of San Francisco, State of California, his successors and all persons acting by, through or under him or them, or any of them, from collecting said sum of $20,879.04, or any part thereof, and from making any seizure or sale of the property of your orator or of any of the stockholders of your orator, or from in any manner attempting to enforce collection or payment of said taxes upon the capital stock of your orator or upon any part of the same, or from in any manner interfering with the

shares of the capital stock of your orator or with the property of your orator or the property of any of the stockholders of your orator in consequence of their ownership of any of the shares of the capital stock of your orator, and restraining and enjoining said Washington Dodge, as Assessor as aforesaid, from instituting any suit or suits, action or actions against your orator or against any of the stockholders of your orator for or in respect of any of said sum of $20,879.04, or any part or portion thereof, as a tax upon or for or on account of the ownership of any of said stockholders of any of the capital stock of your orator, and from the collection of any tax upon any of the capital stock of your orator or any part or portion of the same, and that this Honorable Court do adjudge and declare said assessment and the tax founded thereon illegal and void, and forever enjoin collection or enforcement of said tax or any part or portion of the same from your orator, as well as from any of the stockholders of your orator, and that in the meantime and until the hearing hereof an injunction pendente lite issue herein restraining said defendant as herein and hereby prayed, and that such injunction continue in force until the determination herein, and that upon the final hearing of this cause it may have all the injunctions herein prayed for made perpetual, and that your orator may have such other and further relief as this cause may require, as well as costs.

May it please your Honors to grant unto your orator a writ or writs of subpoena to be issued out of and under

the seal of this Honorable Court and directed to said defendant, Washington Dodge, as Assessor of said City and County of San Francisco, commanding him to appear in this cause at some day certain to be named therein, and to answer in the premises, but not under oath, answer under oath being expressly waived, and to abide by and perform, such decree as may be rendered herein.

T. I. BERGIN,

Solicitor for Complainant.

Northern District of California,
City and County of San Francisco. } ss.

George Grant, being first duly sworn, says: That he is the cashier and secretary of The Nevada National Bank of San Francisco, the complainant in the above-entitled cause; that he has read the foregoing supplemental bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

That the seal said complainant hereunto sets is its true corporate seal, and has been hereunto set by the authority and direction of said complainant.

GEO. GRANT.

Subscribed and sworn to before me this July 2, A. D. 1900.

[Seal] HOLLAND SMITH,

Notary Public in and for the City and County of San Francisco, State of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO.

[Corporate Seal] J. F. BIGELOW,

Vice-President.

The defendant in the above-entitled cause having waived notice of application of complainant for leave to file the foregoing supplemental bill, it is hereby ordered that the complainant therein have, and it is hereby granted leave to file the foregoing supplemental bill.

Dated, San Francisco, July 2d, A. D. 1900.

WM. W. MORROW,

Judge.

[Endorsed]: Filed July 2, 1900. Southard Hoffman, Clerk.

Subpoena ad Respondendum on Supplemental Bill.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

IN EQUITY.

The President of the United States of America, Greeting; to Washington Dodge, as Assessor of the City and County of San Francisco, State of California.

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom, in San Francisco, on the sixth day of August, A. D. 1900, to answer a supplemental bill of complaint exhibited against you in said Court by The Nevada National Bank of San Francisco, a national banking association organized and existing under and by virture of the laws of the United States, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 2d day of July, in the year of our Lord one thousand nine hundred, and of our Independence the 124th.

[Seal] SOUTHARD HOFFMAN,
Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of August next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: United States Marshal's Office, Northern District of California.

I hereby return that I received the within writ on the 3d day of July, 1900, and personally served the same on

the 5th day of July, 1900, on Washington Dodge, as Assessor of the City and County of San Francisco, by delivering to and leaving with Washington Dodge, as Assessor of said City and County said defendant named therein, at the City and County of San Francisco, in said District, an attested copy thereof.

San Francisco, July 5, 1900.

JOHN H. SHINE,
United States Marshal.
By E. A. Morse,
Office Deputy.

Filed July 7, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California,
Respondent.

Answer to Supplemental Bill of Complaint.

The answer of Washington Dodge, as Assessor of the City and County of San Francisco, State of California,

respondent in the supplemental bill of complaint, entitled "The Nevada National Bank of San Francisco, Complainant, against Washington Dodge, as Assessor of the City and County of San Francisco, Respondent."

This respondent now and at all times thereafter saving to himself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said supplemental bill of complaint contained, for answer thereto, or to as much thereof as this respondent is advised it is material or necessary for him to make answer to, answering says:

I.

And admits that The Nevada National Bank of San Francisco, a national banking association, Complainant in the above-entitled cause, did on the 25th day of April, A. D. 1900, file its duly verified, original bill of complaint in equity in the above-entitled Court against Washington Dodge, as Assessor of the City and County of San Francisco, State of California, in which said original bill of complaint there were set forth and alleged the matter and things set forth and alleged in paragraphs I to XV, inclusive, and paragraph XVI down to and including line 20, page 25 of complainant's supplemental bill of complaint.

And in this behalf, respondent alleges that on the 4th day of June, A. D. 1900, Washington Dodge, as Assessor of the City and County of San Francisco, filed his duly verified answer to complainant's original bill of complaint wherein he did set forth:

1.

And admits the facts alleged in paragraph "First" of complainant's bill of complaint.

2.

And admits the facts alleged in paragraph "Second" of complainant's bill of complaint.

3.

And admits the facts alleged in paragraph "Third" of complainant's bill of complaint.

4.

And admits and alleges that under and by virtue of the laws of the State of California all property, not exempt from taxation under the laws of the United States nor under the laws of the State of California belonging to, owned by, claimed by, in the possession or under the control of any person at twelve o'clock M. on the first Monday in March, in each year, is subject to assessment and taxation, and liable to be assessed and taxed, as by the laws of the State of California provided for the fiscal year ending on the 30th day of June of the next succeeding year.

5.

And admits the facts alleged in paragraph "Fifth" of complainant's bill of complaint.

6.

And admits the facts alleged in paragraph "Sixth of complainant's bill of complaint.

7.

And admits the facts alleged in paragraph "Seventh" of complainant's bill of complaint.

8.

And respondent admits that on the first Monday in March, 1900, at 12 o'clock M. of said day, complainant owned and held the following personal property $2,070,000 of the bonds of the United States; the premium on said bonds having on said day and at said time been the sum of $265,284.05 making the said $2,070,000 of United States bonds with the premium thereon equal to the sum of $2,335,284.05; $2,276,917 in cash; but respondent denies that all of said hereinbefore enumerated property, or any thereof, is exempt from assessment or taxation under the laws of the United tSates or of the State of California; and respondent alleges that he has no information or belief upon the subject sufficient to enable him to answer and basing his denial on that ground denies that said property was or is all of the assets or property owned, or held by complainant at 12 o'clock M. of the 5th day of March, 1900.

9.

And respondent admits the further facts alleged in paragraph "9" of complainant's bill of complaint, saying and excepting that respondent denies that the United States bonds held by complainant or the premium thereon, or the cash on hand, at 12 o'clock M. of the first Monday in March, 1900, or either or any thereof, are or were exempt under the laws of the United States, or of the State

of California, or otherwise, or at all, from assessment or taxation.

And respondent alleges that he has no information or belief upon the subject sufficient to enable him to answer and basing his denial on that ground denies that on said first Monday in March, 1900, at noon of said day, complainant held or owned $963,099.80 of bonds of corporations organized or acting under the laws of the State of California for the purposes of constructing, owning or operating railroads, or other bonds of a miscellaneous character, and respondent denies that such bonds or any of them, on the day or year last mentioned, as the corporate property of complainant, were or still are exempt under the laws of the United States or of the State of California; denies that the stock of complainant on said first Monday in March, 1900, was not listed upon said Stock and Bond Exchange, or had not been for nearly a year prior thereto.

10.

And respondent admits, that unless restrained by this Honorable Court, in making the assessment of the capital stock of complainant, he will make the same in the manner following, that is to say; he will make allowance by deduction as follows:

(1) For United States bonds	$2,142,400
(2) For fixtures	3,450
(3) Taxes	582
(4) Expenses	16,240
Total deductions	$2,162,672

Which last-named sum he will divide by 30,000 shares of the capital stock of complainant, leaving $72.08 as the amount of deduction upon each share of the capital stock of complainant.

And respondent admits that the value of the capital stock of complainant is the sum of $185 per share and the same will be assessed at said valuation; from which he will deduct the sum of $72.08 leaving the difference of $112.92 which, for the purposes of assessment and taxation, he will treat as the assessable value of each share of the capital stock of complainant.

But respondent denies that, in ascertaining or determining the value of the capital stock of complainant at $185 per share he will ascertain or determine the same exclusively from the report thereof made in said Stock and Bond Exchange as hereinbefore stated, and in this behalf respondent alleges that he will ascertain and determine the market value of each share of the capital stock of complainant by considering the market value thereof as bought and sold and quoted on said Stock and Bond Exchange on the first Monday in March, 1900, at 12 o'clock of said day, and by estimating and considering the dividends said stock was on said day and time paying to the owners and holders thereof, by considering the sworn statements made by the duly authorized officers of complainant to the Controller of Currency of the United States, and by considering the general reputation of the officers and manager of complainant and of complainant as bank and bankers.

And respondent admits that in making an assessment of the shares of the capital he will exclude from the amount of exemption the sum of $265,284.05, the amount of the premium upon said United States bonds, but respondent denies that he claims or insists or has at any time or at all claimed or insisted that said United States bonds, or any thereof, are exempt or not liable to assessment or taxation.

And respondent admits in ascertaining the market value of said stock, the market value of said bonds will be taken into account, including the premium thereof, and that in ascertaining the amount of deductions to which the stock of complainant is or will be entitled in making such assessment, the amount of said premiums will not be deducted.

And respondent admits that in making such assessment he will not exclude from consideration or from constituting an element of the amount of such assessment the corporate property of complainant, except real estate and mortgages.

11.

And respondent denies the facts alleged in paragraph "Eleventh" of complainant's bill of complaint to and including line 27, page 15, thereof, and each and all of them.

And respondent denies that such assessment and taxation upon the shares of the capital stock of complainant would, or will be in violation of, or repugnant to or in violation of and repugnant to the provisions of section 5219 of the Revised Statutes of the United States, or any Stat-

ute, in that such taxation would, or will be at a greater rate than would or will, be assessed upon other moneyed capital in the hands of individual citizens in the State of California. And respondent denies that, in assessing and taxing the shares of the capital stock of complainant, no deduction would or will or can legally be made from the valuation of shares, or any of them, of debts unsecured by deed of trust, mortgage, or other lien on real or personal property due or owing, due or owing by the stockholders of complainant, or by any of them, to bona fide residents of the State of California; and in this behalf respondent alleges that unless restrained from making an assessment of the shares of the capital stock of complainant, by order of this Honorable Court, he will, in making such assessment, permit to be made and make a deduction from the valuation of such shares, and of each and all of them, of debts unsecured by deed of trust, mortgage or other lien on real or personal property, due or owing by the holders of such shares to bona fide residents of the State of California; alleges that heretofore, to wit, on or about the 23d day of March, 1900, respondent caused to be addressed and mailed to the stockholders of complainant, and to each of them, who owned, claimed, possessed or controlled any shares of the capital stock of complainant at 12 o'clock M. of the first Monday in March, 1900, a written notice, notifying such stockholders, and each and all of them, of the intention of respondent to assess such stock to such shareholders, and requesting them to call at the office of respondent, in the City Hall, in the City

and County of San Francisco, State of California, and present such unsecured debts, due or owing to bona fide residents of the State of California or other exemptions, as they might have, and which, under the laws of the United States and of the State of California, are deductible from the valuation of such shares of stock, that he might permit and make such deductions alleges that, in response to such notice and invitation numerous stockholders of complainant's capital stock have made return, as required and permitted by section 3629 of the Political Code of unsecured debts owned by them on the 5th day of March, 1900, at 12 o'clock M. due and owing to bona fide residents of the State of California, and have requested that such unsecured debts be deducted from that valuation of the shares of stock of complainant, which said deductions respondent is prepared to, and will, unless restrained by order of this Honorable Court, make and allow from the valuation of said shares of stock.

And respondent alleges that he has no information or belief upon the subject sufficient to enable him to answer and basing his denial on that ground denies that the amount of moneyed capital in the City and County of San Francisco, State of California, on the first Monday in March, 1900, at noon of said day, invested by banks and bankers, having their principal place of business in said City and County, or residents therein in unsecured solvent credits, or from which, under the Constitution and laws of this State unsecured debts can be deducted, was or is the sum of $14,074,561; or any other sum, or any part

thereof; denies that on the day and year last aforesaid the amount of moneyed capital in the State of California other than in the City and County of San Francisco, invested by banks or bankers in unsecured solvent credits, or from which, under the constitution and laws of the State of California unsecured debts can be deducted, or otherwise, was the sum of $7,589,302, or any other sum, or any part thereof; denies that on the day and year last aforesaid said banks or bankers, at the City and County of San Francisco, had debts unsecured by trust deed, mortgage or other lien on real or personal property, owing by such banks or bankers in said City and County of San Francisco, amounting to the sum of $36,710,062, or any other amount, or any part thereof; denies that on said day last aforesaid the amount of debts unsecured by trust deed, mortgage or other lien on real or personal property, owing by said banks or bankers, or otherwise, in the State of California, other than in the City and County of San Francisco, was the sum of $32,400,304, or any other sum, or any part thereof; and respondent denies that the amount of moneyed capital invested in such solvent credits by such banks or bankers on the day and year last aforesaid in the City and County of San Francisco, or in the State of California as compared with the amount of moneyed capital invested in the shares of the capital stock of complainant, or otherwise, or at all, is so large and substantial, that the assessment or taxation of the shares of the capital stock of complainant without deduction therefrom, or without being able to deduct there-

from, debts unsecured by trust deed mortgage, or other lien on real or personal property, as may have been owing by the respective holders of the shares of the capital stock of complainant on the day and year last aforesaid, would or will be an illegal or unjust, or illegal and unjust, or any discrimination at all against the owners or holders of the shares of the capital stock of complainant or would or will make the taxation of said shares of stock, or any of them, at a greater rate or at any rate other than is imposed upon other moneyed capital in the hands of individual citizens in the State of California, or particularly in the City and County of San Francisco, State of California. And respondent denies that the solvent credits hereinbefore referred to or any solvent credits so held as aforesaid by the banks or bankers in the City and County of San Francisco, or in the State of California, are moneyed capital in the hands of individual citizens of the State of California, which enter into competition for business, or otherwise, with complainant.

And in this behalf respondent is informed and believes and upon such information and belief alleges the fact to be that the paid-up capital of Commercial Bank and Trust Companies, engaged in the business of banking in the City and County of San Francisco, State of California, was on the first Monday in March, 1900, at 12 o'clock M. of said day, ever since has been, and now is the sum of $9,889,615 and no more, and that the reserve fund, undivided profits and surplus fund of said Commercial Banks and Trust Companies, on the day and year last aforesaid aggregated

the sum of $10,444,447, and no more, making a total of $20,344,062; that the market value of the shares of the capital stock of said Commercial Banks and Trust Companies, as bought and sold on the Stock and Bond Exchange, and in open market on the day and year last aforesaid, was the sum of $23,325,246, and no more; that the said Commercial Banks and Trust Companies own and have invested in United States bonds and other property exempt from taxation under the laws of the United States and of the State of California, the aggregate sum of $15,109,422, and no more, that said banks and trust companies are or will be assessed for real and personal property, including solvent, credits, owned, claimed, possessed or controlled by them on the first Monday in March, 1900, at 12 o'clock M. of said day, in the sum of $14,794,628, or more.

And in this behalf respondent further alleges that the Commercial Bank and Trust Companies, and such and all of them entering into competition for business with complainant in the City and County of San Francisco, and in the State of California, were or will be assessed and taxed for the fiscal year ending June 30, 1901, at as great or greater a rate than is or will be imposed or assessed upon the shares of the capital stock of complainant.

12.

And respondent denies that in making said assessment of said shares of the capital stock of complainant he will not proceed in the manner directed by said act of the legislature of March 14, 1899, in this; that in making such assessment to each stockholder of complainant he will not

deduct from the value of his share of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of the capital stock of complainant.

And respondent denies that on the first Monday in March, 1900, or at any time all the property of complainant, except its real estate and mortgages, was on said day, or has thence hitherto been, or still is exempt by law from assessment or taxation and in this behalf respondent alleges the fact to be that the personal property and assets, and each and all thereof of complainant, were on said day and at said time, and ever since have been, and now are, constituent elements in the estimation and determination of the value of the shares of the capital stock of complainant, on account of which the shareholders of complainant are entitled to no deduction or deductions whatsoever.

And respondent denies that, if deduction of all the property of complainant exempt from assessment or taxation were made to each shareholder in assessing said stock, there would remain anything of value subject to assessment, or that the assessment of said shares at said value of $112.92 per share, would or will be based wholly, or otherwise, or at all, upon the supposed or fictitious property, or upon property exempt by the Court or laws of the United States from assessment or taxation; and in this behalf respondent alleges that a full and entire deduction from the value of the shares of complainant will

be permitted and made of the proportionate value per share of all property not included or permitted or required to be included by law in the estimation and determination of the value of the said shares, and of each of them, for purposes of assessment and taxation.

13.

And respondent admits that in and by section 3610 of said Political Code it is provided that in case the tax on any stock in a national bank is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall be liable therefor and the Assessor shall collect the same from said bank, which may charge the amount of the tax so collected of the account of the stockholders owning such stock; and shall have a lien prior to all other liens on said stock and the dividends and earnings thereof for the reimbursement of it of the taxes so paid. Admits that the ownership of the shares of the capital stock of complainant, or any of them, may and does change by the endorsement and transfer of the certificate representing a given number of said shares without there being any change in the name or names in which the said certificate or certificates stand on the books of complainant. Admits that while the shares of stock of complainant on the first Monday in March, 1900, at noon of said day, may have been owned as the same appear upon the books of complainant or as the name of the owners thereof appear in the list of stockholders kept by complainant, yet intermediate that day and the day when respondent may call upon or demand payment of complain-

ant of the taxes to be levied, should respondent ever call upon or demand payment of such taxes from complainant the ownership of said shares of stock may have been changed, but respondent denies that, while complainant may have known who the owners of said shares of stock were on the first Monday in March, 1900, noon of that day, at the time a demand upon complainant for payment of such tax may be made, respondent may or will be wholly or otherwise unable to discover who are the owners of the same, or to whose account the amount of such tax so paid will or can be charged, and in this behalf respondent is informed and believes, and upon such information and belief charges the fact to be that the shares of the capital stock of complainant standing on the books of complainant in the names of certain persons as aforesaid, at 12 o'clock on the first Monday in March, 1900, were actually claimed, owned, belonging to, in the possession or under the control of such person or persons on said day and at said time, and that the same ever since that day and hour have been and now are owned, claimed, belonging to, in the possession of, or under the control of the same person or persons in whose name or names the said shares appeared upon the books of complainant as aforesaid.

And respondent denies that should complainant be compelled to pay a or any tax upon its shareholders, as provided in section 3610 of the Political Code, it would be impossible for complainant to charge the amount of such tax to the accounts of the respective stockholders or any such shares of stock, inasmuch as complainant be whol-

ly or otherwise, unable to know who were the real owners of such shares of stock, or of any of them, or who or what shareholders were legally liable for the amount of such tax, and denies that by reason of any such payment such tax or any part thereof, would be irretrievably, or otherwise, or at all, lost to complainant.

And respondent denies that, if complainant should pay the amount of such tax and should attempt to charge the proportionate amount thereof to the persons in whose names the said shares of stock stood on the first Monday in March, 1900, at noon of said day, or at any other time, on the books of complainant, according to the number of shares standing in the name of each person, complainant would be subjected to or would be harassed by a great or any multiplicity of suits, or by any suits whatsoever, by or on behalf or at the instance of several or any stockholders of complainant. And respondent denies that any one or more of said stockholders, would have the right of resisting or contesting the payment of any tax on any share or shares of the capital stock of complainant owned by such stockholders, he would have the right to show that at 12 o'clock M. of the first Monday in March, 1900, he was not legally liable therefor, or that complainant had made payment of said tax in its own wrong, or otherwise, in the case it should pay the same; denies that in that case it would result that complainant had made illegal payment of said tax such illegal payment would constitute a breach of trust or illegal division of the corporate assets of complainant from the trust upon which it holds the same for the benefit of its creditors or stockholders.

14.

And respondent denies that he has threatened the seizure or sale, or does now threaten the seizure or sale of any personal or other property belonging to complainant sufficient to raise the sum of $22,642.47, or any other sum, or any part thereof, and denies if such seizure or sale should be made such seizure or sale would deprive complainant of its property without due process of law; and respondent denies that such seizure or sale would be contrary to or in violation or repugnant to the rights or privileges of complainant under or pursuant to the provisions of the Constitution or laws of the United States, or under or pursuant to, the provisions of the Constitution or the laws of the State of California, or particularly under or pursuant to the provisions of section 1, article XIV of the Constitution of the United States, known as the National Bank Act, or under or pursuant to the provisions of section 1, of article XIII of the Constitution of the State of California; or under or pursuant to the provisions of section 3608 of the Political Code of the State of California, as the same existed at 12 o'clock M. on the first Monday in March, 1900, or that the act of the Legislature of the State of California of March 14, 1899, under and pursuant to which respondent might act in making said assessment and taxation or making said assessment or taxation or making such seizure or sale, is in violation of or repugnant to the rights or privileges of complainant under or pursuant to the provisions of the Constitution or the laws of the United States, or particularly under or pursuant to

the provisions of section 1, article XIV of the Constitution of the United States, or under or pursuant to the provisions of the act of Congress of the United States known as the National Bank Act, or any or all of such laws, Constitutions, or provisions, or otherwise or at all.

And respondent denies that, under the provisions of said Act of March 14, 1899, complainant would be protected only in paying the taxes of the stockholder or stockholders who owned stock of complainant at 12 o'clock on the first Monday in March, 1900, and who did not own real estate to secure the payment of the same, or would not be protected in paying said tax, or any part thereof, at the time of such payment by complainant, such shares had theretofore actually changed in ownership and had become the property of any person or persons other than or different from those persons owning it at 12 o'clock M. of the said first Monday in March, 1900, or had become the property of any person or persons who at the time of such payment by complainant might own real estate to secure the payment of the tax on such shares of stock. And respondent denies that by reason of all or any such supposed or pretended facts complainant would be involved in great or any doubt or uncertainty as to its rights or duties in the premises or otherwise, or would be exposed to a great or any multiplicity of litigation, or any litigation, to the loss or detriment, or otherwise, of all or any nondelinquent stockholders of complainant.

15.

And respondent denies that this is a suit in equity of a civil nature and in this behalf respondent alleges that

the subject matter of said bill of complaint is not within the jurisdiction of a court of equity or cognizable therein.

16.

And respondent further submits to this Honorable Court that complainant has a full, complete, speedy and adequate remedy at law against respondent for all causes of action or causes of actions, stated or attempted to be stated in complainant's bill of complaint on file in this action; and he here claims the same benefits of the objection as if he had not demurred to the relief so sought.

Wherefore, this respondent having fully answered, confessed, traversed, and avoided and denied all the matters in the said bill of complaint material to be answered according to his best knowledge and belief, humbly prays this Honorable Court to enter its decree, that the respondent be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained, and for such further and other relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

II.

And respondent admits that on April 25th, A. D. 1900, a subpoena was issued in equity and placed in the hands of the United States marshal of said District for service, who on the same day served the same upon respondent.

Admits that on April 25th, A. D. 1900, the above-named Court made a restraining order now on file in said cause wherein and whereby it was ordered that respondent, as Assessor of the City and County of San Francisco, State

of California, his agents, servants, and attorneys, and all persons acting by, through, or under his authority do desist and refrain, and they were hereby restrained from making any assessment upon any of the capital stock of The Nevada National Bank of San Francisco, complainant in said action, for the fiscal year ending June 30th, A. D. 1901, and from listing in the assessment-book prepared or to be prepared by respondent for the fiscal year ending June 30, A. D. 1901, or otherwise, or in any manner or at all listing the or any of the shares of the capital stock of the complainant in said or in any assessment, and from making any assessment and tax upon the or any of the shares of the capital stock of the Nevada National Bank of San Francisco for said last mentioned fiscal year, and from making any collection of any tax on any of the shares of the capital stock of the Nevada National Bank of San Francisco for the fiscal year ending June 30th, A. D. 1901, as alleged in said bill of complaint, and from seizing or selling any property of said complainant in the satisfaction of any tax upon any of the shares of the capital stock of The Nevada National Bank of San Francisco aforesaid based upon any assessment made or to be made by respondent for the fiscal year ending June 30th, A. D. 1901, and from instituting any suit or suits, action or actions, against said complainant for the collection of any of such tax, and from in any manner interfering with or molesting said complainant or disturbing it in the possession of its property for or by reason of your looking to the obtainment of payment or satisfaction of any tax upon any of

the shares of its capital stock during the pendency of this action and until the further order of the Court, and at the same time in and by said order said respondent was required to show cause on May 7th, A. D. 1900, at 11 o'clock of that day, or as soon thereafter as counsel can be heard, at the courtroom of said Court, why an injunction pendente lite should not be issued in the above-entitled cause restraining and enjoining said defendant as therein set forth, which restraining and enjoining order and order to show cause were on the same day and year, to wit, on April 25th, A. D. 1900, duly served upon said respondent, as Assessor as aforesaid.

III.

And respondent admits that thereafter on June 4th, A. D. 1900, respondent did file his verified answer therein, and thereafter, to wit, on June 11th, A. D. 1900, the complainant in said action did file its replication to the answer of the respondent therein, and thereafter said order to show cause came on regularly before the Court for hearing and was thereupon submitted to the Court for decision, and afterwards, to wit, on June 25th, A. D. 1900, the Court did make its order wherein and whereby a preliminary injunction in said cause was denied and the pending restraining order was dissolved without prejudice however, to the right of the complainant upon a supplemental bill, or other pleading, to apply for an injunction, if so advised, to restrain the respondent from collecting the tax after an assessment has been made, or one is made, and this order is made upon the condition

that the complainant shall have the opportunity of making certain application to the Court before the collection of the tax is enforced or attempted to be enforced by respondent.

IV.

That on June 30th, A. D. 1900, respondent, as Assessor of the City and County of San Francisco, did make an assessment of the aforesaid capital stock of The Nevada National Bank of San Francisco, complainant, for the fiscal year ending June 30th, 1901, and the making whereof was sought to be restrained in and by said original bill of complaint. But respondent denies that said assessment so actually made by respondent is subject to the same or any objections, or is subject to any objection or objections at all in said original bill alleged or otherwise against a threatened assessment therein alleged or any assessment; and respondent denies that said assessment so made is liable or other objections in said original bill of complaint or elsewhere alleged against the threatened assessment in said original bill of complaint alleged, or otherwise or at all; and respondent denies that the assessment so made by respondent is illegal, and unconstitutional and void, or illegal or unconstitutional or void for the reasons, or in the respects in which in said original bill of assessment therein mentioned was or is alleged to be illegal, or unconstitutional or void, and respondent denies that said assessment so made as aforesaid is illegal or void for any reason or reasons, or in any respect or respects, and respondent

prays that all and singular the assessments in said original bill of complaint contained in respect to the illegality or unconstitutionality of said threatened assessment may be deemed and taken to be herein repeated and denied with respect to said assessment so actually made by respondent, with a like force and effect as if the denials and averments in respondent's answer to said original bill of complaint contained in this behalf were herein repeated in full in respect to said assessment so actually made.

V.

And respondent admits that on July 30th, A. D. 1900, respondent as Assessor of said City and County of San Francisco informed and notified complainant that on Monday, July 2, 1900, at one o'clock, P. M., of that day respondent as Assessor of the City and County of San Francisco would proceed to collect and enforce collection of the sum of $20,879.04 of and from complainant for taxes founded and based upon said assessment so actually made by him as hereinbefore stated upon the shares of the capital stock of complainant owned by the shareholders thereof as in said bill of complaint alleged, but respondent denies that unless restrained by an order of this Honorable Court, respondent as Assessor as aforesaid will proceed to collect or enforce collection of said sum of $20,879.04, or of any other sum or of any part thereof, of or from complainant for, or in respect of, or as taxes upon the shares of the capital stock of complainant, or that he will seize or sell the property of complainant therefor, or otherwise

enforce collection of the same unless restrained therefrom by this Honorable Court.

And in this behalf respondent alleges the facts to be that, under and by virtue of the Constitution and laws of the State of California and especially of section 3628 of the Political Code of said State, respondent is commanded and required, between the first Mondays in March and July of each year, in the discharge of his duties as Assessor of the City and County of San Francisco, to ascertain the names of all taxable inhabitants, and all the property in the County subject to taxation and to assess the same to the persons by whom it was owned or claimed, or in whose possession or control it was on the first Monday of March next preceding; that under and in accordance with the provisions of section 3820 and 3821 of the Political Code of said State respondent is commanded and required, at the time of the assessment of property as aforesaid, to collect the taxes on all property when, in his opinion, such taxes are not a lien upon real property sufficient to secure the payment of the same; that such collection may be made by seizure and sale of any personal property owned by the person against whom the tax is assessed at the time of making the assessment or at any time before the third Monday in July of each year, and not otherwise, or at any other time; that such collections can be made only upon receipts furnished respondent by the Auditor of the City and County of San Francisco which receipts such Auditor is authorized and required to furnish under and in accordance with section 3738 of the Political Code of said

State, and under and by the provisions of said section of said code respondent is required to return all unused receipts to such Auditor on the first Monday in August of each year; that the time during which respondent is authorized and empowered to make such collections, and especially the collection of the personal property taxes assessed against the shares of complainant, has heretofore, to wit, on the third Monday of July, 1900, wholly expired and terminated, and respondent is without any present or future power or authority to collect by seizure and sale or otherwise, or to receive or receipt for, any of said taxes so assessed as aforesaid.

VI.

And respondent further submits to this Honorable Court that complainant has a full, complete, speedy, and adequate remedy at law against respondent for all causes of action, or causes of actions stated, or attempted to be stated in complainant's supplemental bill of complaint on file in this action; and he here claims the same benefits of the objection as if he had not demurred to the relief so sought.

Wherefore, this respondent having fully answered, confessed, traversed and avoided and denied all the matters in the said supplemental bill of complaint material to be answered, according to his best knowledge and belief, humbly prays this Honorable Court to enter its decree, that the respondent be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sus-

tained, and for such further and other relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

WASHINGTON DODGE,

Assessor of the City and County of San Francisco, Respondent.

FRANKLIN K. LANE,

Solicitor for the City and County of San Francisco, Respondent.

I hereby certify that in my opinion the foregoing answer is well founded in point of law.

FRANKLIN K. LANE.

[Endorsed]: Service by copy of within original is hereby admitted this 24th day of August, A. D. 1900.

T. I. BERGIN,

Solicitor for Complainant.

Filed August 24, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, and JOSEPH H. SCOTT, as Tax Collector of the City and County of San Francisco, State of California,
Defendants.
No. 12,927.

Replication to Answer to the Supplemental Bill of Complaint.

The replication of The Nevada National Bank of San Francisco, complainant in the above-entitled cause, to the answer of the defendants to the supplemental bill of complaint filed therein shows that this repliant saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the answer of said defendants in the above-entitled cause to the supplemental bill of complaint therein saith: That it will aver and prove its supplemental bill in the above-entitled

cause to be true, certain, and sufficient in law to be answered unto, and that the said answer of said defendants is uncertain, untrue and insufficient to be replied unto by this repliant without this; that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true, all of which matters and things repliant is and will be ready to aver and prove as this Honorable Court shall direct, and humbly prays as in and by its bill it has already prayed.

T. I. BERGIN,
Solicitor for Complainant.

T. I. BERGIN,
Of Counsel for Complainant.

[Endorsed]: Received copy August 31st, 1900.

FRANKLIN K. LANE,
Solicitor for Defendants.

Filed August 31, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and JOSEPH H. SCOTT, as Tax Collector of said City and County,
Defendants.
No. 12,927.

Second Supplemental Bill.

To the Judges of the Circuit Court of the United States for the Northern District of California, in the Ninth Circuit, Sitting in Equity:

The Nevada National Bank of San Francisco, a national banking association, complainant in the above-entitled cause, respectfully shows to the Court that on April 25, A. D. 1900, it filed its duly verified bill of complaint in equity in the above-entitled Court against Washington Dodge, as Assessor of the City and County of San Francisco, State of California, wherein it did set forth:

I.

The incorporation of said complainant as a national banking association under the laws of the United States with a capital stock of three million ($3,000,000) of dollars, divided into thirty thousand (30,000) shares of stock of the par value of one hundred ($100) dollars each share, and its place of business in said city and county of San Francisco, State of California, and that it is engaged in carrying on business as therein alleged.

II.

That Washington Dodge is the duly elected, qualified and acting assessor of said City and County of San Francisco, State of California, and the person and officer authorized to assess taxes in and for said city and County of San Francisco as therein alleged.

III.

That on March 7, 1881, the legislature of the State of California passed an act entitled "An act to amend the Political Code of the State of California, relating to revenue by adding a new section to be known as section 3608 of said Code, and by amending sections 3607, 3617, 3627, 3629, 3650, 3651, and 3652 of said code, and by repealing section 3640 of said code all relating to revenue" as in said bill of complaint set forth. That on March 14, 1899, the legislature of said State did pass an act entitled "An act to amend section 3608 of the Political Code of the State of California relating to the general revenue of the State, and to property liable to taxation for the pur-

poses of revenue, and to add new sections to be known as sections 3609 and 3610 also relating to the general revenue of the state and to property liable to taxation for the purposes of revenue" therein set forth.

IV.

That all property in the State of California not exempt from taxation under the laws of the United States and under the laws of the State of California in possession or under the control of any person at 12 o'clock noon on the first Monday in March in each year is subject to assessment and taxation as therein alleged for the year ending June 30, of the next succeeding year.

V.

That your orator, pursuant to the requirements of the Revised Statutes of the United States in that behalf, kept a list of its stockholders as therein set forth and alleged, and that the number of said stockholders at 12 o'clock noon on the first Monday in March, A. D. 1900, was 203.

VI.

That under the provisions of the Constitution of the State of California the fiscal year in said State of California is from the first Monday of July in each year to the 30th day of June of the next succeeding year. That pursuant to the laws of said State the Board of Supervisors of said City and County of San Francisco did, on September 18, 1899, fix the rate of tax for State, city and county for the fiscal year ending June 30, 1900, and the State Board of Equalization of said State of California,

pursuant to the laws of said State in that behalf, at the time and in the manner provided therefor by law, did fix the rate of taxation for the fiscal year ending June 30, 1900, on all property, both real and personal, in said City and County of San Francisco, at the rate in said bill of complaint set forth, and thereafter, to wit, on September 18, A. D. 1899, said Board of Supervisors did fix the rate of said taxation for the fiscal year ending June 30, 1900, on all property in said City and County of San Francisco not exempt by law at the sum of 60 cents and 1 mill on each $100 of valuation of said taxable property upon the assessment-roll for said fiscal year. That the combined rate of taxes for said fiscal year for State, city and county purposes amounted to the sum of $1.63 on each $100 valuation of taxable property, as in said bill alleged.

VII.

That under and by virtue of the laws of said State of California every tax due upon personal property is a lien upon the real property of the owner of said personal property from and after the first Monday of March in each year, and that the defendant Dodge claims that under and pursuant to the laws of said State, when any taxes on personal property are not a lien upon real property sufficient to secure the payment thereof, the right to collect all such taxes between the first Monday in March and the third Monday in July in each year, and said Dodge claimed the power to make such collection by seizure and sale of any personal property owned by the person against whom

such tax is assessed, together with costs, etc., as in said bill alleged.

VIII.

That said defendant, Washington Dodge, as Assessor as aforesaid, notified your orator that he would proceed to enforce collection of the same as in said bill of complaint alleged, and that the amount of such tax at the rate aforesaid upon the stock of the stockholders of your orator unsecured by real estate owned by the holders of such stock would amount in the aggregate to the sum of $22,642.47, which said sum defendant Dodge, as Assessor, notified complainant that he would collect as aforesaid from your orator unless restrained therefrom as in said bill of complaint alleged.

IX.

That said defendant Dodge, as Assessor of said City and County of San Francisco, intended and threatened to assess the stock of your orator in the mode and manner in said bill of complaint alleged, and that the mode and manner in which he so threatened to make said assessment was and would be illegal, unconstitutional and void, as in said bill of complaint alleged and upon the grounds therein stated.

X.

That under the laws of the State of California all shares of stock in corporations organized under the laws of said State are exempt from taxation, save and except national bank associations, whose property, other than real estate, is by federal statute exempt from assessment

and taxation, and that assessing the same and the manner in which the property of such corporations is assessed will work a discrimination against the stock of your orator, and the taxation upon the stock of your orator would be at a greater rate than is or would be assessed upon other moneyed capital in the hands of individual citizens of said State of California, therein alleging the particulars in which such discrimination would consist.

XI.

That in making said assessment said Assessor would not proceed as provided and required in and by the provisions of the act of the legislature of March 14, 1899, therein alleged, and would depart therefrom in the particulars in said bill of complaint specified.

XII.

That under the provisions of said section 3610 of the Political Code therein mentioned, in case the tax on any stock in a national bank is unsecured by real estate owned by the holder of such stock, then the bank in which said stock is held shall become liable therefor, and the Assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock, and shall have a lien prior to all other liens on said stock, and the dividends and earnings thereof, for the reimbursement to it of the taxes so paid. That the ownership of such stock may and does change by endorsement and transfer of the certificates thereof without there being any change in the name or names in which said certificate or certificates

stand on the books of your orator, by reason whereof it would be impossible for your orator to safely pay said tax for the reasons and upon the grounds in said bill of complaint specified, whereby your orator would be subjected to a multiplicity of suits, as in said bill of complaint set forth.

XIII.

That the threatened seizure and sale of the property of your orator to raise the amount necessary to pay said sum of $22,642.47 would, unless restrained by this Honorable Court, deprive your orator of its property without due process of law, and that said assessment and taxation and threatened seizure and sale were and would be contrary to and in violation of and repugnant to the rights and privileges of your orator under the provisions of the constitution and laws of the United States and of the State of California therein mentioned, and that your orator would be remediless in the premises without the interposition of a court of equity.

XIV.

That this suit is one in equity of a civil nature and that the matter in dispute, exclusive of interest and costs, exceeds the sum of $5,000, to wit, the sum of $22,000 and upwards, as therein alleged, and did therein and thereby pray that it be protected from a multiplicity of suits at law and in equity and pray for an injunction enjoining said Assessor from making said threatened assessment and taxation upon the shares of the capital stock of your orator and from listing in the assessment-book prepared

or to be prepared by said defendant Dodge, as Assessor, for the fiscal year ending June 30, 1901, or from listing in any other manner or at all in said assessment-book the or any of the shares of the capital stock of your orator and from making the said threatened seizure and sale of the property of your orator, or in any manner interfering with the shares of the capital stock or the property of your orator, and from instituting any suit or suits, action or actions against your orator for the collection of any tax claimed to be due upon any shares of the capital stock of your orator with a preliminary restraining order to the like effect; and that upon the final hearing this Court do adjudge and declare said threatened assessment and all action thereunder and the said statute under which said defendant Dodge threatened to make said assessment, illegal and void and forever enjoin him from making said threatened assessment, and that said injunction be made perpetual, and that your orator have such other and further relief as to the Court might seem meet in the premises, together with costs, and did pray subpoena to issue as therein and thereby prayed for.

XV.

That on April 25th, A. D. 1900, a subpoena in due form of law was issued upon said bill in equity and placed in the hands of the United States marshal of said district for service, who, on the same day, served the same upon the defendant therein, Washington Dodge, as Assessor of the City and County of San Francisco; that on April 25, A. D., 1900, the above-named Court made a restraining order, now on

file in said cause, wherein and whereby it was ordered that Washington Dodge, as Assessor of the City and County of San Francisco, State of California, defendant in the above-entitled action, his agents, servants and attorneys and all persons acting by, through or under his authority, do desist and refrain from, and they were thereby restrained from making any assessment upon any of the capital stock of The Nevada National Bank of San Francisco, the complainant in said action, for the fiscal year ending June 30, A. D. 1901, and from listing in the assessment-book prepared or to be prepared by him for the fiscal year ending June 30, A. D. 1901, or otherwise, or in any manner or at all listing the or any of the shares of the capital stock of complainant in said or in any assessment-book, and from making any assessment and tax upon the or any of the shares of the capital stock of The Nevada National Bank of San Francisco for said last-mentioned fiscal year and from making any collection of any tax on any of the shares of the capital stock of The Nevada National Bank of San Francisco for the fiscal year ending June 30, A. D. 1901, and from seizing or selling any property of said complainant in satisfaction of any tax upon any of the shares of the capital stock of The Nevada National Bank of San Francisco aforesaid, based upon any assessment made or to be made by him for the fiscal year ending June 30, A. D. 1901, and from instituting any suit or suits, action or actions, against the complainant, etc., as in said restraining order mentioned. That thereafter, on June 4, A. D. 1900, said defendant, Washington

Dodge, did file his answer therein, and thereafter, to wit, on June 11, A. D. 1900, the complainant in said action did file its replication to the answer of the defendant therein, and thereafter said order to show cause came regularly on before the Court for hearing, and was thereupon submitted to the Court for decision, and afterwards, to wit, on June 25, A. D. 1900, the Court did make its order wherein and whereby a preliminary injunction in said cause was denied and the pending restraining order was dissolved, without predudice, however, to the right of the complainant upon a supplemental bill or other pleading to apply for an injunction, if so advised, to restrain the said assessor from collecting the tax after an assessment had been made, if one should be made, and said order dissolving said restraining order was made upon the condition that complainant should have the opportunity of making application to said Court before the collection of the tax was enforced or attempted to be enforced.

That in June 30, A. D. 1900, said defendant, as Assessor of said City and County of San Francisco, did make his assessment of the aforesaid capital stock of your orator for the fiscal year ending June 30, A. D. 1901, as in said bill of complaint alleged, and the making whereof was sought to be restrained in and by said bill of complaint. That thereafter, to wit, on July 2, A. D. 1900, your orator did file its duly verified supplemental bill of complaint therein setting forth the matters and things hereinbefore stated, and thereupon further alleging that on June 30, A. D. 1900, said defendant Dodge, as Assessor of said City

and County of San Francisco, did make his assessment of the aforesaid capital stock of your orator for the fiscal year ending June 30, A. D. 1901, as in said bill of complaint alleged, the making whereof was sought to be restrained in and by said bill of complaint. That said assessment so actually made by said defendant, Washington Dodge, was subject to the same objections in said bill alleged against the assessment, the alleged making whereof was in said bill of complaint described, and said assessment so made was and is liable to all the legal objections in said bill of complaint alleged against the threatened assessment in said bill of complaint alleged, and did therein and thereby allege that the assessment so made by said Washington Dodge was illegal, unconstitutional and void for the reasons and in the respects in which the threatened assessment in said bill of complaint was alleged to be illegal, unconstitutional and void, and that all the averments in said bill of complaint contained in respect to the illegality and unconstitutionality of the threatened assessment therein alleged might be deemed and taken to be repeated in respect to said assessment as actually made by said defendant with a like force and effect as if the averments in said bill contained in that behalf were therein repeated in full in respect to said assessment so actually made by said defendant, Washington Dodge.

That on June 30, A. D. 1900, said defendant, Washington Dodge, as Assessor of said city and County, informed and notified your orator that on Monday, July 2, A. D. 1900, at 12 o'clock Meridian of that day, he, said de-

fendant as Assessor of said City and County of San Francisco, would proceed to collect and enforce collection of the sum of $20,879.04 of and from your orator for taxes founded and based upon said assessment so actually made by him as therein alleged upon the shares of the capital stock of your orator owned by the stockholders thereof as in said bill of complaint alleged, and your orator did therein aver that unless restrained by the order of this Honorable Court from so doing, said Assessor would, on July 2, A. D. 1900, or as soon thereafter as he could proceed to collect and enforce collection of said sum of $20,879.04 of and from your orator for and in respect of and as taxes upon the shares of the capital stock of your orator as in said bill of complaint alleged, and would seize and sell the property of your orator therefor and otherwise enforce collection of the same unless restrained therefrom by this Honorable Court.

In consideration whereof your orator prayed the relief in and by said supplemental bill prayed, as will more fully appear upon reference to said supplemental bill now on file herein.

That afterwards, to wit, on said July 2, A. D. 1900, upon reading said duly verified bill of complaint in said cause and said duly verified supplemental bill of complaint, said Court did order as follows, that is to say:

"It is hereby ordered that the defendant in the above-entitled action, Washington Dodge, as Assessor of the City and County of San Francsco, State of California, show cause, if any he have, on August 6,

A. D. 1900, at the hour of 11 o'clock A. M. of that day, or as soon thereafter as counsel can be heard, at the courtroom of said Court in the Appraisers' Building situated on the northeast corner of Washington and Sansom streets, in said City and County of San Francisco, District aforesaid, why an injunction pendente lite should not issue in the above-entitled cause restraining and enjoining said defendant from collecting the sum of twenty-thousand, eight hundred and seventy-nine and four one-hundredths dollars ($20,879.04) or any part or portion thereof, as a tax founded upon the assessment made by him upon the capital stock of The Nevada National Bank of San Francisco, the complainant in the above-entitled action, as in said bill and supplemental bill alleged for the fiscal year ending June 30, 1901, and from making any seizure or sale of any property of The Nevada National Bank of San Francisco aforesaid, or of any of the stockholders of The Nevada National Bank of San Francisco, of from in any manner attempting to enforce collection or payment of said taxes upon the capital stock of The Nevada National Bank of San Francisco, or upon any part of the same, or from in any manner interfering with the shares of the capital stock of The Nevada National Bank of San Francisco, or with the property of The Nevada National Bank of San Francisco, or the property of any of the stockholders of The Nevada National Bank of San Francisco in consequence of their ownership of any of the shares of the capital stock of The Nevada National Bank of San Francisco, and from instituting any suit or

suits, action or actions, against The Nevada National Bank of San Francisco, or any of the stockholders of The Nevada National Bank of San Francisco, for or in respect of any of said sum of twenty thousand, eight hundred and seventy-nine and four one-hundredths dollars ($20,879.04), or any part or portion thereof, as a tax upon or for or on account of the ownership of any of the stockholders of any of the capital stock of The Nevada National Bank of San Francisco, and from the collection of any tax upon any of the capital stock of The Nevada National Bank of San Francisco, or any part or portion of the same, based or founded upon said assessment so made by said Washington Dodge, as Assessor as aforesaid, and in the meantime and until the further order of this Court said Washington Dodge, is hereby restrained from collecting the sum of twenty thousand, eight hundred and seventy-nine and four one-hundredths dollars ($20,879.04), or any part or portion thereof, as a tax founded upon the assessment made by him upon the capital stock of The Nevada National Bank of San Francisco, the complainant in the above-entitled action as in said bill and supplemental bill alleged for the fiscal year ending June 30, 1901, and from making any seizure or sale of any property of The Nevada National Bank of San Francisco aforesaid, or any of the stockholders of The Nevada National Bank of San Francisco, or from in any manner attempting to enforce collection or payment of said taxes upon the capital stock of The Nevada National Bank of San Francisco, or upon any part of the same, or from in any manner interfering with the shares

of the capital stock of The Nevada National Bank of San Francisco, or with the property of The Nevada National Bank of San Francisco, or the property of any of the stockholders of The Nevada National Bank of San Francisco in consequence of their ownership of any of the shares of the capital stock of The Nevada National Bank of San Francisco, and from instituting any suit or suits, action or actions, against The Nevada National Bank of San Francisco, or against any of the stockholders of The Nevada National Bank of San Francisco for or in respect of any of said sum of twenty thousand, eight hundred and seventy-nine and four one-hundredths dollars ($20,879.04), or any part or portion thereof as a tax upon or for or on account of the ownership of any of the stockholders of any of the capital stock of The Nevada National Bank of San Francisco, and from the collection of any tax upon any of the capital stock of The Nevada National Bank of San Francisco, or any part or portion of the same based or founded upon said assessment so made by said Washington Dodge, as assessor as aforesaid"; which order to show cause was thereafter, to wit, on July 2, 1900, duly served upon said Washington Dodge, as Assessor of the City and County of San Francisco by the United States marshal, the certificate of service of the same now remains on file in said action.

That after service of said restraining order upon said defendant, Washington Dodge, as Assessor of said City and County of San Francisco as aforesaid, and despite the same, said Washington Dodge did on July 2, 1900, com-

plete and deliver said roll as prepared and made by him to John A. Russell, clerk of the Board of Supervisors of the City and County of San Francisco, in which said assessment-roll was set down, the assessment and tax of the stockholders of the complainant in the above-entitled cause and as the same are contained and appear in the delinquent tax list of the City and County of San Francisco for the fiscal year ending June 30, 1901, published June 10, 1901, by said defendant, Joseph H. Scott, as Tax Collector of said City and County of San Francisco.

That the various persons named in said delinquent tax list assessed for shares in The Nevada National Bank of San Francisco in abbreviated form, as, for instance, first occurs Adler Dr. I, 50 shares, Nevada National Bank, were and are the shareholders and stockholders of complainant in the above-entitled action, the assessment and tax of whose stock said action was brought to enjoin and restrain and to restrain threatened seizure and sale of the personal property of said complainant in satisfaction of the tax levied upon the assessment of the capital stock of said complainant as in said bill and supplemental bill of complaint alleged.

That said stockholders of complainant whose stock was assessed by said Washington Dodge, as Assessor of said City and County of San Francisco as aforesaid, and whose stock said defendant, Joseph H. Scott, as Tax Collector of said City and County of San Francisco, gives notice that he will make sale of, and who are named in said delinquent tax list, are the following, to wit:

	A	Shares
1	Adler Dr. I.	50
2	Allen Henry F.	600
3	Arnold B.	50
	B	
4	Bachman L. S.	50
5	Bachman L. S. in trust.	65
6	Do	60
7	Barth Jacob.	5
8	Baruch Jacob.	50
9	Baumann Sig.	25
10	Bigelow, J. T.	260
11	Bremer W. H.	50
12	Burns Minnie E.	12
	C	
13	Crocker H. S.	100
	D	
14	Demond Alice Belle	12
	E	
15	Ehrman Clara H.	35
16	Ehrman Jos.	25
17	Ehrman S. W.	20
	F	
18	Fleishman Mrs. Carrie.	15
	G	
19	Gatzert Babette.	75
20	Gillon J.	50

21 Goodhart Mrs. Hattie L..... 100
22 Goodwin Mrs Elizabeth 75
23 Greenebaum Wm..... 25
24 Guigne C. De..... 250

H

25 Hass Abe..... 100
26 Hass K..... 300
27 Hass Samuel.....125
28 Harris Mrs Dora..... 50
29 Heller Mrs. Bella..... 100
30 Heller Clarence L..... 15
31 Heller Mrs. Clara H..... 200
32 Hellman H. W..... 250
33 Hellman Isaias W.....5,215
34 Hellman Isaias W., Trustee..... 40
35 Hellman Isaias W., Jr..... 500
36 Hellman Louis M..... 50
37 Hinshelwood Miss Emilia..... 13
38 Hirschler Mrs. Stella S..... 25
39 Hopkins Mrs. Mary K..... 525

J

40 Jewett W. F..... 25

K

41 Kerckhoff Anton P..... 20
42 Kerckhoff Elise..... 12
43 Kerckhoff Elizabeth..... 7
44 Kerckhoff Wm. G..... 4
45 Kerckhoff H. H..... 7

45 Kent Mrs. Adaline E..... 25
46 Klau Leopold..... 100
47 Kline Louis & Co..... 50
48 Koshland Mrs. Florence S..... 50

L

49 Leege Chas. F..... 45
50 Levy Mrs Max..... 5
51 Liberman J..... 100
52 Lyman D. B..... 300

M

53 MacGavin Mrs. Kate..... 12
54 Marshall Louis..... 40
55 Marshall Miss Nellie S..... 10
56 Martin W. O. H..... 100
57 Mitau Mrs. Fannie..... 12
58 Morse I. H..... 60
59 Moore Florence L. Mrs..... 12

N

60 Newmark Mrs. Augusta..... 75

O

61 O'Connor M. P..... 200
62 Okell Chas. J..... 20

P

63 Paige Calvin..... 250
64 Palmierir E. C..... 25
65 Parrott Louis B..... 150

R

66 Roos Achille..... 90
67 Roos Adolphe..... 130
68 Roos George H..... 40
69 Roos Leon L..... 40
70 Rosenberg Mrs. Lena..... 25
71 Rosenfelds John Sons..... 300
72 Rothschild Simon..... 50
73 Rothschild Wm..... 50
74 Ruddock Mrs. Maria N. Exec..... 200

S

75 Sachs Miss Carrie..... 12
76 Sachs David..... 50
77 Sachs D. M..... 22
78 Sachs Edgar D..... 22
79 Sachs Miss Hattie..... 12
80 Sachs Samuel..... 100
81 Sagendorph Mary Demond..... 12
82 Simpkins Mrs. Kate R..... 100
83 Son Bros. & Co..... 50
84 Strassburger Mrs. Julia..... 25
85 Sutro Alfred..... 10
86 Sutro Gustav..... 80
87 Sutro & Co..... 50

U

88 Union Trust Co., Pledgee..... 200

V

89 Van Nuys I. N..... 250

W

90	Walter Clarence R.	25
91	Walter Emanuel	500
92	Weiler Marks	125
93	Wolfskill John	100
94	Wyman Henry C.	25

That after the Board of Supervisors of said City and County of San Francisco as Board of Equalization had equalized the assessments contained in said assessment list so prepared and made by said Washington Dodge, as Assessor as aforesaid, the same was delivered to the Auditor of said City and County of San Francisco within the time and in the manner prescribed therefor by law, and thereafter within the time and in the manner prescribed therefor by law said Auditor did deliver a copy of the corrected assessment-book styled "Duplicate Assessment-Book" prepared and authenticated in the manner and form prescribed by law to the Tax Collector of said City and County of San Francisco. That on June 4, A. D. 1900, and long prior thereto and thence hitherto, said J. H. Scott, was and is the lawfully acting and qualified Tax Collector of said City and County of San Francisco, and as such has and now holds said corrected assessment-book styled "Duplicate Assessment-Book"; that on June 10, 1901, said Joseph H. Scott, as Tax Collector of said City and County of San Francisco as aforesaid, prepared and published in the manner and form prescribed by law a delinquent

tax list containing the names of the aforesaid stockholders of complainant with their assessment for and on account of their shares of the capital stock in complainant with the amount of tax levied and to be collected thereon, and appended to said delinquent tax list so published as aforesaid said Joseph H. Scott, did set forth a notice wherein and whereby he did give notice that default having been made in the payment of taxes due to the State of California, and to the City and County of San Francisco for the year ending June 30, 1901, upon the personal property, real estate and state poll tax therein described, he, said Joseph H. Scott, as Tax Collector, of said City and County of San Francisco, State of California, by virtue of the power and authority in him vested by law, did upon the 26th day of November, 1900, levy upon the said personal property, and did upon Monday the 29th day of April, 1901, levy upon the said roll prepared, and that as such Tax Collector he will upon Monday, the 24th day of June, 1901, at the hour of 11 o'clock A. M. sell the same to the State in the Tax Collector's office in said City and County, unless the delinquent taxes, together with the costs and penalties, are paid. That said notice has been prepared and published by said Joseph H. Scott, Tax Collector as aforesaid, and that unless restrained therefrom by this Honorable Court, he, said Joseph H. Scott, as Tax Collector as aforesaid, will sell the shares of stock of the stockholders of your orator in said delinquent tax list specified, as well as other property, unless restrained therefrom by this Honorable Court, wherein and whereby

and by means whereof the whole aim and purpose of said suit commenced by your orator against said Washington Dodge, as Assessor as aforesaid, and the process of this Honorable Court made and issued, and to be made and issued therein, will be wholly avoided, defeated and made frustrate.

That at the time said Joseph H. Scott, Tax Collector as aforesaid, received said duplicate assessment-book, to wit, on the 8th day of October, 1900, as well as at the time that he made and published said delinquent tax list as aforesaid, he well knew of the pendency of the above-entitled suit and the nature and purpose thereof, and that therein and thereby complainant sought to have said assessor restrained from making said assessment and restrained from enforcing the same, and having this Honorable Court adjudge and declare as in and by said bill and supplemental bill of complaint was prayed, and that at the time said Joseph H. Scott, as Tax Collector as aforesaid, made and published said delinquent tax list he then and there well knew that sale of said stock as by him therein and thereby notified to be made would wholly defeat and frustrate the purposes of said suit, yet despite the premises he, said Joseph H. Scott, as Tax Collector as aforesaid, has prepared and published said delinquent tax list in the manner aforesaid, and has given out and proclaimed in manner aforesaid his purpose to sell the stock of the stockholders of your orator, sale whereof is sought to be restrained in and by said original and supplemental bill of complaint. That said Joseph H. Scott, as Tax Col-

lector as aforesaid, made no sale or offer for sale of any of the shares of the capital stock of The Nevada National Bank of San Francisco aforesaid, assessed in manner aforesaid in said assessment so actually made by said defendant, Washington Dodge, as assessor as aforesaid, for or during or in any part of the year, A. D. 1900, and did not at the time of the collection of taxes upon personal property collect any tax upon any of the aforesaid stock of The Nevada National Bank of San Francisco aforesaid, although the same and every of the same was wholly unsecured by any lien upon any real estate.

In consideration whereof and forasmuch as your orator is remediless in the premises under the strict rules of the common law and has no adequate relief only in this Honorable Court where matters of this sort are properly cognizable and relievable, your orator, prays that an injunction issue out of this Honorable Court restraining and enjoining not only said Washington Dodge, as assessor as aforesaid, but likewise said Joseph H. Scott, as Tax Collector of said City and County of San Francisco, their and each of their successors, from making said threatened sale of the property of said stockholders, as well as the property of your orator, or from in any manner attempting to enforce collection or payment of the taxes upon the capital stock of your orator, or upon any part of the same founded upon said assessment, or from in any manner interfering with the shares of the capital stock of your orator or with the property of your orator or the property of any of the stockholders of your orator in consequence

of their ownership of any of the shares of the capital stock of your orator, and restraining and enjoining said Washington Dodge, as Assessor as aforesaid, and said Joseph H. Scott, as Tax Collector as aforesaid, or either of them, from instituting any suit or suits, action or actions, against your orator, or against any of the aforesaid stockholders of your orator hereinbefore enumerated for or on account of their ownership of any of the capital stock of your orator, and from the collection of any tax upon any of the capital stock of your orator, or any part or portion of the same founded upon said assessment, and that this Honorable Cout do adjudge and declare said assessment and said tax illegal and void and forever enjoin the collection of the same from your orator, as well as from any and all of the shareholders of your orator, and that in the meantime and until the hearing hereof an order to show cause be directed to said defendants and issue out of this Honorable Court commanding said Washington Dodge, as assessor as aforesaid, and said Joseph H. Scott, as Tax Collector, as aforesaid, at a date and time to be fixed in said order to show cause before this Honorable Court, if any they have, why your orator should not have an injunction pendente lite, embracing all of relief herein prayed for, such injunction to continue in force until determination of the hearing of a writ of injunction herein, and that at the hearing of such order to show cause your orator have an injunction pendente lite allowed embracing all of the relief herein and hereby prayed for, such injunction to continue in force until the determination of

the said writ of injunction, and that on the final hearing of this action it may have all the injunctions herein prayed for made perpetual, and that your orator may have such other and further relief as this cause may require, as well as costs.

May it please your Honors to grant unto your orator a writ or writs of subpoena to be issued out of and under the seal of this Honorable Court and directed to said defendants, Washington Dodge, as Assessor of said City and County of San Francisco, and said Joseph H. Scott, as Tax Collector of said City and County of San Francisco, commanding them and each of them to appear in this cause at some day certain to be named therein and to answer in the premises, but not under oath, answer under oath being expressly waived, and to abide by and perform such decree as may be rendered herein.

T. I. BERGIN,
Solicitor for Complainant.

Northern District of California, } ss.
City and County of San Francisco. }

George Grant, being duly sworn, says on oath: That he is the cashier and secretary of The Nevada National Bank of San Francisco, the complainant in the above-entitled cause; that he has read the foregoing second supplemental bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters that he believes it to be true.

That the seal said complainant hereunto sets is its true corporate seal and has been hereunto set by the authority and direction of said complainant.

[Corporate Seal of Complainant] GEO. GRANT.

Subscribed and sworn to before me this June 20, A. D. 1901.

[Seal] HOLLAND SMITH,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed June 20, 1901. Southard Hoffman, Clerk.

Subpoena ad Respondendum on Second Supplemental Bill.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

IN EQUITY.

The President of the United States of American, Greeting, to Washington Dodge, as Assessor of the City and County of San Francisco, State of California, and Joseph H. Scott, as Tax Collector of said City and County of San Francisco, State of California.

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in San Francisco, on the fifth day of August, A. D. 1901, to answer a second supplemental bill of complaint exhibited against you in said court by The Nevada

National Bank of San Francisco, a national banking association, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 20th day of June, in the year of our Lord one thousand nine hundred and one, and of our Independence the 125th.

[Seal] SOUTHARD HOFFMAN,
Clerk.

Memorandum Pursuant to Rule 12, Supreme Court U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of August next, at the clerk's office of said Court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 20th day of June, 1901, and personally served the same on the 20th day of June, 1901, on Joseph H. Scott, as Tax Collector of the City and County of San Francisco, State of California, by delivering to and leaving with Joseph H. Scott, as Tax Collector of the City and County of San Francisco, State of California, one of said defendants

named therein, at the City and County of San Francisco, in said District, an attested copy thereof.

San Francisco, June 21, 1901.

JOHN H. SHINE,
United States Marshal.
By E. A. Morse,
Office Deputy.

Filed June 21, 1901. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to wit, the November term, A. D. 1901, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 20th day of January, in the year of our Lord one thousand nine hundred and two. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, et al.,
Defendants.
No. 12,927.

Order Denying Application for Injunction, etc.

Complainant's applications, by orders to show cause is-

sued April 25th, 1900, and June 20th, 1901, herein, having been heard and submitted to the Court for consideration and decision, and the cause having also been heard upon the pleadings and agreed statements of facts filed, and having been argued and submitted to the Court for consideration and decision, and said matters having been fully considered, it is by the Court now

Ordered, that said orders to show cause above mentioned be and hereby are discharged, that complainant's applications for injunction herein be and hereby are denied; that the restraining orders contained in the abovementioned orders to show cause be and hereby are dissolved, and that complainant's bill, supplemental bill and second supplemental bill herein be and hereby are dismissed, and that defendants have a decree for their costs herein.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco,
Respondent.
No. 12,927.

Enrollment.

The complainant filed its bill of complaint herein on the 25th day of April, 1900, which is hereto annexed.

A subpoena to appear and answer in said cause was thereupon issued, returnable on the 4th day of June, 1900, which is hereto annexed.

The respondent appeared herein on the 31st day of May, 1900, by Franklin K. Lane, Esq., City Attorney of the City and County of San Francisco, his solicitor.

On the 4th day of June, 1900, an answer to the bill was filed herein, which is hereto annexed.

In the 11th day of June, 1900, a replication to said answer was filed herein and is hereto annexed.

On the 2d day of July, 1900, an order allowing filing of supplemental bill was made and entered, a copy of which order is hereto annexed, and a supplemental bill was filed herein and is hereto annexed.

A subpoena to appear and answer said supplemental bill was issued returnable August 6th, 1900, and is hereto annexed.

On the 24th day of August, 1900, an answer to supplemental bill was filed herein and is hereto annexed.

A replication to said answer was filed herein on the 31st day of August, 1900, and is hereto annexed.

On the 20th day of June, 1901, a second supplemental bill was filed herein and is hereto annexed.

A subpoena to appear and answer said second supplemental bill was issued herein; returnable August 5th, 1901, and is hereto annexed.

The appearance of J. H. Scott, as Tax Collector, etc., defendant herein, was entered on the 5th day of August, 1901 by Franklin K. Lane, Esq., City Attorney of the City and County of San Francisco, his solicitor.

On the 20th day of January, 1902, an order was made and entered herein, dissolving restraining orders, discharging orders to show cause, and dismissing bill and supplemental bills, a copy of which order is hereto annexed.

Thereafter a final decree was signed, filed and entered herein, in the words and figures following, to wit:

At a stated term, to wit, the November term, A. D. 1901, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 20th day of January, in the year of our Lord one thousand nine hundred and two. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco., et al.,
Defendants.
No. 12,927.

Final Decree.

This cause came on to be heard at this term, and was argued by counsel, and submitted to the Court for consideration and decision;

Whereupon, on consideration thereof, it is ordered, adjudged, and decreed that complainant's bill of complaint, supplemental bill of complaint, and second supplemental

bill of complaint herein be, and the same hereby are, dismissed, and that defendants recover from complainant their costs herein expended taxed at $30.40.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed and entered January 20, 1902. Southard Hoffman, Clerk.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Northern District of California.

NEVADA NATIONAL BANK,
Complainant,
vs.
WASHINGTON DODGE, Assessor, etc.,
Respondent.

Memorandum of Costs and Disbursements.

Disbursements:

Clerk's Fees	$10.40
Docket Fee	20.00
Total	$30.40

January 25, 1902. No appearance.

Costs taxed at $30.40.

SOUTHARD HOFFMAN,
Clerk.

United States of America,
Northern District of California,
City and County of San Francisco. } ss.

W. I. Brobeck, being duly sworn deposes and says: That he is one of the attorneys for the respondent in the above-entitled cause, and as such is better informed, relative to the above costs and disbursements, than the respondent. That the items in the above memorandum are correct, to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

W. I. BROBECK.

Subscribed and sworn to, before me, this 22d day of January, A. D. 1902.

[Seal] J. J. GREIF,
Deputy County Clerk.

To T. I. Bergin, Esq., Attorney for Complainant.

You will please take notice that on Saturday, the 25th day of January, A. D. 1902, at the hour of 11 o'clock A. M., I will apply to the clerk of said Court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

FRANKLIN K. LANE,
Attorney for Respondent.

[Endorsed]: Filed this 22d day of January, A. D. 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

Certificate to Enrollment.

Whereupon, said pleadings, subpoenas, copies of orders, and final decree, and a memorandum of taxed costs, are hereto annexed, said final decree being duly signed, filed, and enrolled, pursuant to the practice of said Circuit Court.

Attest, etc.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Enrolled Papers. Filed January 20, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN EQUITY.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California,
Defendant.
No. 12,927.

Monday, June 25, 1900.

Opinion on Application for an Injunction Pendente Lite.

T. I. BERGIN, Attorney for Complainant.

FRANKLIN K. LANE, City Attorney, for Defendant.

MORROW, Circuit Judge.—This is an application on the part of the complainant for an injunction pendente lite, restraining and enjoining the defendant, as Assessor of the City and County of San Francisco, from making an assessment upon the shares of the capital stock of the complainant for the fiscal year ending June 30, 1901.

This Court is of the opinion that a temporary injunction should not issue to restrain the Assessor from making the assessment described in the bill in this case. That officer should be permitted to determine the elements and to make an official record of the amount of the taxes which he deems the complainant liable to under the statute. The issues raised by the allegations of the bill and the admissions and denials of the answer as to the elements and the amount of the taxes, ought to be fully determined while the Assessor has the authority to act. Moreover, when this amount is fixed, the controversy is clearly defined, once for all, and if the tax is finally sustained, the principal sum upon which interest and costs and other liabilities may accrue will have been determined, so that the city and county may not suffer any loss by reason of this action to determine the legality of the taxes.

A preliminary injunction will therefore be denied and the pending restraining order be dissolved, without prejudice, however, to the right of the complainant upon a supplemental bill or other pleading to apply for an injunction if so advised, to restrain the Assessor from collecting the tax after an assessment has been made, if one is made; and this order is made upon the condition that the complainant shall have the opportunity of making such an application to the Court before the collection of the tax is enforced or attempted to be enforced by the defendant.

[Endorsed]: Filed June 25, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

EXHIBIT "A"

..TABULAR STATEMENT...

Showing the Financial Condition of the Commercnks of California at close of business, on the 31st day of March, 1900, as Reported to the Bank Commissioners.

RESOURCES

	NAMES OF THE BANKS	BANK PREMISES	OTHER REAL ESTATE	INVESTED IN STOCKS, BONDS AND WARRANTS	S L E	LOANS ON STOCKS, BONDS AND WARRANTS	LOANS ON OTHER SECURITIES	LOANS ON PERSONAL SECURITY	MONEY ON HAND	DUE FROM BANKS AND BANKERS	OTHER ASSETS	TOTALS OF ASSETS AND LIABILITIES
160	Interior Commercial Banks	1,725,029.57	5,810,358.78	4,527,402.61	5.71	2,882,046.48	2,598,928.87	21,508,595 16	4,593,437.04	10,569,179 77	1,009,862.67	69,626,816.66
18	San Francisco Commercial Banks.....	1,699,584.76	2,621,495.38	5,434,978.61	1.18	11,859,717.19	2,378,597.82	18,501,592 37	10,088,439 09	13,746,014.75	1,360,722 61	72,626,753.76
178	Totals State Commercial Banks of Californa...	3,424,614.33	8,431,854.16	9,962,381.22	6.89	14,741,763.67	4,977,526.69	40,010,187.53	14,681,876.13	24,315,194.52	2,370,585.28	142,253,570.42

LIABILITIES

	CAPITAL PAID UP	RESERVE AND PROFIT AND LOSS	DUE DEPOSITORS	DUE TO BANKS AND BANKERS	STATE, COUNTY OR CITY MONEY	OTHER LIABILITIES
160	18,381,864.59	7,055,633.49	41,472,158 15	1,789,959 49	212,373.78	714,827.16
18	7,958,925.53	11,786,466.97	42,725,832.65	6,827,492.82		3,328,035.79
178	26,340,790.12	18,842,100.46	84,197,990.80	8,617,452.31	212,373.78	4,042,862.95

ATTEST:

C. H. DUNSMOOR,
Secretary of the Board of Bank Commissioners,
SAN FRANCISCO, CAL.

STATE OF CALIFORNIA, } ss.
CITY AND COUNTY OF SAN FRANCISCO. }

I, C. H. DUNSMOOR, Secretary of the Board of Bank Commissioners of the State of California, do hereby certify that I have carefully compared the foregoing copy of a Tabular Statement showing totals of Resources and Liabilities of Commercial Banks in California and of the endorsements thereupon, with the original document remaining on file in this office, and that the same is a true and correct copy therefrom, and of the whole of said document, so far as same refers to totals.

IN WITNESS WHEREOF, I have hereunto set my hand (having no official seal) at the office of the Board of Bank Commissioners, in the City and County of San Francisco, Cal., this 9th day of June, 1900.

C. H. DUNSMOOR,
Secretary of Board of Bank Commissioners.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California,
Defendant.
No. 12,927.

Affidavit of Charles H. Dunsmoor.

Charles H. Dunsmoor, being duly sworn, says on oath: I am and have been for the year last past and upwards the duly acting and qualified secretary of the Board of Bank Commissioners organized and acting under that certain act of the legislature of the State of California entitled "An act creating a Board of Bank Commissioners and prescribing their duties and powers, approved March 30, 1878, and the several acts of the legislature of the said State of California amendatory thereof and supplementary thereto," and as such secretary I am and have been the legal custodian of the books, papers, and records of

said Board of Bank Commissioners; that the document hereto annexed, marked Exhibit "A," which is hereby referred to and made part hereof, is a correct copy of the total amounts of the resources and liabilities of the commercial banks organized, acting and doing business in the State of California, who have made reports to said Board of Bank Commissioners pursuant to the requirements of said act of the legislature, and the same constitutes part of the records of the office of said Board of Bank Commissioners and it has been made by this affiant in the course of his duties as secretary of said Board of Bank Commissioners in obedience to the directions of said Board of Bank Commissioners and the requirements of said act of the legislature; that said document fully and truly exhibits the resouces and liabilities of said banks as reported to said Board of Bank Commissioners during the period of time the same purports to cover; that said Board of Bank Commissioners has no official seal, but said Exhibit "A" is certified to by affiant in the manner in which he certifies the official documents of said board.

C. H. DUNSMOOR.

Subscribed and sworn to before me this June 9, A. D. 1900.

[Notarial Seal] HOLLAND SMITH,

Notary Public in and for the City and County of San Francisco, State of California.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and JOSEPH H. SCOTT, as Tax Collector of said City and County,
Defendants.
No. 12,927.

Agreed Statement of Facts.

It is hereby stipulated and agreed by and between the respective parties to the above-entitled action that upon the hearing or any further proceeding that may be had in the above-entitled cause, the following facts shall be deemed and taken to be true for the purposes thereof, that is to say:

I.

Paragraphs 1, 2, 3, 4, 5, 6, 7, 8 of the original bill of complaint in the above-entitled cause are true, and so much of paragraph 9 of said bill of complaint as relates to the Stock and Bond Exchange and the mode and man-

ner of doing business therein in selling stocks, bonds and other securities and making report of the same and ascertainment therefrom of the current value of such stocks, bonds, and other securities as in said bill of complaint alleged is true. That the stock of complainant was on the first Monday in March, A. D. 1900, and for a year and upwards prior thereto, listed upon said Stock and Bond Exchange. That on or about February 28, A. D. 1900, an official sale of the stock of complainant was reported in said official publication known as the Stock and Bond Exchange at $185 per share, since which time no sale of any of the stock of complainant has been reported in said Stock and Bond Exchange.

II.

That on said first Monday of March, A. D. 1900, at 12 o'clock noon of that day, said complainant did not own, and has not at any time owned, any real estate.

III.

That on the first Monday of March, A. D. 1900, at 12 o'clock noon of that day, to wit, on March 5th, noon, A. D. 1900, complainant held and owned $2,070,000 of bonds of the United States issued in accordance with the provisions of an act of Congress entitled "An act to authorize the funding of the national debt, approved July 14, 1870, amended by an act approved January 20, 1871," and other similar acts of Congress of the United States in this behalf made and provided. That on said first Monday of March, A. D. 1900, at 12 o'clock noon, the premium on

said $2,070,000 bonds was the sum of $265,284.05, making said $2,070,000 of United States bonds, with the premium thereon, equal to the sum of $2,335,284.05.

IV.

That on said first Monday of March, A. D. 1900, at 12 o'clock noon of that day, said complainant owned the sum of $2,276,917 in cash that it then, theretofore, and thence hitherto has used in the current course of its business as a national bank. That the aforesaid United States bonds, said cash on hand and the other personal property constituting the furniture, notes, etc., fixtures and appurtenances of the banking house and business of The Nevada National Bank of San Francisco aforesaid, constituted the assets of The Nevada National Bank of San Francisco in conducting its business of a national bank, and the percentage of the United States bonds that The Nevada National Bank of San Francisco aforesaid is required by law to hold, constituted part and parcel of said United States bonds hereinbefore mentioned and described, a correct statement of the entire assets and liabilities of said bank on said first Monday of March, A. D. 1900, at 12 o'clock noon of said day, being in the words and figures following:

Assets:		
Call loans	$4,678,632.76	
Bills discounted.....	120,131.78	
Bills receivable	133,700.00	4,932,464.54
Treasurer United States 5 per cent redemption fund		29,705.00

following, that is to say, he did make deductions as follows:

1st. For United States bonds $2,142,400

2d. For Miscellaneous bonds and quasi public corporations hereinbefore mentioned 963.099

Total deductions $3,105,499

which sum he divided by 30,000 shares of the capital stock of complainant, leaving $103.50 as the amount of deductions upon each share of the capital stock of said complainant, and in making said assessment did estimate said capital stock at the sum of $185 per share, from which said last-named sum he did deduct said sum of $103.50 and no more, and no other deductions or exemptions were made in making said assessment, leaving the difference of $81.50, which, for the purposes of said assessment, he treated as the assessable value of each of the shares of the capital stock of said complainant. In ascertaining and determining the market value of each of the shares of the capital stock of said complainant, and making said assessment, said Assessor considered the market value thereof quoted on said Stock and Bond Exchange on said first Monday in March, A. D. 1900, at 12 o'clock noon of said day, and also took into consideration the dividends said stock was earning and paying to the owners and holders thereof, the sworn statement made by the officers of complainant to the Controller of the Currency of the United States, and the general reputation of the officers

and manager of said complainant, and the complainant as bank and bankers. In making said assessment said Washington Dodge, as Assessor as aforesaid, did exclude from the amount of deductions or exemptions said sum of $192,884.05, being part of the amount of the premium upon said United States bonds.

VI.

That on said first Monday of March, A. D. 1900, at 12 o'clock noon of that day there were 116 of the shareholders in complainant owning the aggregate among them 15,933 shares of the capital stock of complainant, and who, to wit, said 116 shareholders did not, nor did any of them, on said first Monday of March at 12 o'clock noon of that day, or at all, own real estate, and no one of said shareholders owned any real estate, and the tax upon their said stock was not secured by real estate owned by them or any of them on said first Monday of March at 12 o'clock noon of that day or at any time. That the total amount of said tax upon said 15,933 shares of stock amounted to the sum of $20,879.04.

That the ownership of the shares of stock of complainant may and does change by endorsement and transfer of the certificate or certificates evidencing and representing any given number of shares without there being any change in the name or names in which the said certificate or certificates stand upon the books of complainant, and ownership thereof may and does change intermediate 12 o'clock noon on the first Monday in March annually and the time of making of the assessment by the Assessor of

said City and County of San Francisco as required by law. That said bill of complaint correctly states the number of shareholders in complainant as therein alleged, and the entire capital stock of complainant was on said first Monday in March, A. D. 1900, at 12 o'clock noon of that day, held and owned by said 203 shareholders in complainant.

VII.

That on or about March 23, A. D. 1900, and before the assessment of said shares of stock of complainant, said Washington Dodge did cause to be addressed and mailed to the shareholders of complainant, and to each of them who owned, claimed, possessed or controlled any shares of the capital stock of complainant at 12 o'clock noon on said first Monday of March, A. D. 1900, a printed notice reading in the words and figures following, to wit:

[Seal of the City and County of San Francisco.]

Office of the City and County Assessor, City Hall.

San Francisco, March 23, 1900.

Isaias W. Hellman, Nevada Bank.

Dear Sir: As you are the owner of National Bank stock, you will be assessed as authorized by law as follows:

Shares of the First National Bank, S. F.

Shares of the S. F. National Bank, S. F.

5215 Shares of the Nevada National Bank, S. F., $5,892.95

Shares of Crocker, Woolworth National Bank, S. F.

The assessment will be attached to any real estate you

may own in the city and county. If you are not the owner of any realty, such steps, for the immediate collection of the tax, as are authorized by law will be taken.

If you have any exemptions or reductions allowed by law, please call at the Assessor's office, City Hall, San Francisco, and present them within ten days from the date hereof.

Respectfully,

WASHINGTON DODGE,

Assessor.

That in response to said notice said shareholders of complainant did not, nor did any of them, make any return or statement or avail themselves of the invitation or request therein contained, or furnish any statement of any debts unsecured by trust deed, mortgage or other lien on real or personal property due or owing by them, or any of them, to bona fide residents of the State of California. That the complainant did not, nor did any officer or agent thereof, make return or statement of any debts due or owing by such complainant unsecured by trust deed, mortgage or other lien on real or personal property to bona fide residents of the State of California, nor did complainant or any officer or agent of complainant ask or request any such deduction or any deduction.

VIII.

That the tabular statement hereto annexed, marked Exhibit "A," which is hereby referred to and made a part hereof, truly and correctly shows the financial condition

of the commercial banks of California on the 5th day of March, A. D. 1900, at 12 o'clock noon of that day and at the close of business on said 5th day of March, A. D. 1900, as reported to the Bank Commissioners of the State of California organized and acting under that certain act of the legislature of the State of California, entitled "An act creating a Board of Bank Commissioners and prescribing their duties and powers, approved March 30, 1878, and the several acts of the legislature of said State of California amendatory thereof and supplementary thereto." That said commercial banks were and are corporations organized and acting under the laws of the State of California, and were and are citizens of the State of California, and are assessed and pay taxes in the manner and form prescribed by the laws of the State of California, and that the solvent credits owned and held by said banks on said first Monday in March, A. D. 1900, at 12 o'clock noon of that day were and are moneyed capital in the hands of individual citizens of the State of California, to wit, said corporations which enter into competition in business with complainant; that said banks and said property were assessed and taxed for the fiscal year ending June 30, 1901, and the franchise of said commercial banks and trust companies were also assessed to such corporations, the valuation of such franchise being ascertained and fixed by deducting from the aggregate market value of the stock of such companies the value of the other property of such companies, the remainder being the valuation at which such franchises were assessed and taxed. That on the

first Monday of March, 12 o'clock, noon, 1900, there were shares of stock in banking corporations amounting to the sum of $30,000,000 in said State.

IX.

That on June 30, A. D. 1900, said Washington Dodge, as Assessor as aforesaid, did make and complete his assessment-book in manner aforesaid, and therein did assess the stock of complainant in manner aforesaid and set down therein the tax thereon, to wit, on said 13,933 shares of the capital stock of complainant the sum of $20,879.04, payment of which sum of money he, said Assessor, did on June 30, A. D. 1900, demand of complainant in said City and County of San Francisco, and did then and there inform complainant that if payment of the same were not made to him, he would proceed to collect and enforce collection and payment of the same, as alleged in the supplemental bill of complaint in the above-entitled cause, and the assessment of the capital stock of complainant in said supplemental bill of complaint alleged and in the answer to said supplemental bill alleged was made in the mode and manner hereinbefore described and the same constitutes the assesment of the capital stock of complainant for the fiscal year ending June 30, 1901.

That said Washington Dodge, as Assessor as aforesaid, after completing said assessment, to wit, on July 2, A. D. 1900, did deliver the same to John A. Russell, clerk of the Board of Supervisors of said City and County of San Francisco, as clerk of the Board of Equalization of said City and County of San Francisco, and thereafter, to wit,

on July 18, 1900, after the Board of Equalization of said City and County of San Francisco had equalized said assessment, said John A. Russell, as clerk thereof, did deliver said assesment-book to the Auditor of said City and County of San Francisco, and after said Auditor had performed his duties in and about said assessment-book, he, the said Auditor of said City and County of San Francisco, afterwards, to wit, on October 8, A. D. 1900, did deliver the duplicate assessment-book, comprising and containing said assessment so made in manner aforesaid, to Joseph H, Scott,who was then, theretofore, and has thence hitherto continued to be and still is the duly elected, acting and qualified tax collector of said City and County of San Francisco. That in said duplicate assessment-book as delivered to said Joseph H. Scott, as tax collector as aforesaid, are listed and set down and assessed the stockholders of complainant for the number of shares of stock by them respectively held and owned in complainant on the first Monday of March, A. D. 1900, at 12 o'clock noon of that day, together with the amount of tax set opposite the name and number of shares of stock by each of them respectively held, the amount of such taxes so set forth in said duplicate assessment-book against said 116 shareholders of complainant constituting said sum of $20,879.04 as hereinbefore stated, which said duplicate assessment-book and the assessment of the stock of complainant and the tax therein contained and charged and founded upon the assessment made by said Washington Dodge, as Assessor of said City and County of San Francisco, in manner and form as hereinbefore described.

That thereafter, to wit, on June 10, A. D. 1901, as such tax collector, said Joseph H. Scott, did publish the delinquent tax list in the manner and form prescribed by law, wherein he did give notice in the words and figures, following to wit:

"State of California,
City and County of San Francisco. } ss.

Public notice is hereby given that default having been made in the payment of taxes due to the State of California and to the City and County of San Francisco, for the year ending the 30th day of June, 1901, upon the personal property, real estate and State poll tax hereinafter described, Joseph H. Scott, Tax Collector of the City and County of San Francisco, State of California, by virtue of the power and authority in him vested by law, did, upon Monday, the 26th day of November, 1900, levy upon said personal property, and did upon Monday, the 29th day of April, 1901, levy upon the said real property, and that the Tax Collector will upon Monday, the 24th day of June, 1901, at the hour of 11 o'clock A. M., sell the same to the State in the Tax Collector's office in said city and county, unless the taxes delinquent, together with the costs and penalties, are paid.

JOSEPH H. SCOTT,

Tax Collector of the City and County of San Francisco."

In which delinquent tax list so published as aforesaid are set forth and contained the names of said 116 shareholders of complainant with the amount of shares by

them respectively owned as in the original and second supplemental bill of complaint in the above-entitled cause named and set forth, and but for the order of this Court said Joseph H. Scott, as Tax Collector as aforesaid, would have made sale of the stock of said stockholders as by him stated in said notice of sale appended to his delinquent tax list as aforesaid.

Dated Dec. 6th, 1901.

T. I. BERGIN,
Solicitor for Complainant.
FRANKLIN K. LANE,
City Attorney, Solicitor for Respondent.

[Endorsed]: Filed December 7, 1901. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO,
Complainant,

vs.

WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and JOSEPH H. SCOTT, as Tax Collector of said City and County,
Defendants.

No. 12,927.

Petition for Appeal.

To the Honorable, the Circuit Court Above Named:

Your petitioner, the complainant in the above-entitled cause, represents that there is manifest error committed

the injury of petitioner in the final decree pronounced this case against it in favor of the defendants therein, ed and entered herein January 20th, 1902, and your petiioner is entitled to an appeal herein.

Wherefore, your petitioner, considering itself aggrieved the decision of this Honorable Court, prays for an apeal from said final decree to the United States Circuit ourt of Appeals for the Ninth Circuit

Your petitioner herewith files its bond in the penal sum $500.00 which bond is approved by the Honorable W. . Morrow, one of the Judges of this Court, and appelnt also files its assignment of errors with its petition.

T. I. BERGIN,

Solicitor for Complainant and Appellant.

[Endorsed]: Filed January 22, 1902. Southard Hoffan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and JOSEPH H. SCOTT, as Tax Collector of said City and County,
Defendants.
No. 12,927.

Assignment of Errors.

Now comes The Nevada National Bank of San Francisco, the complainant in the above-entitled cause, and makes the following assignment of errors in the decree of the Circuit Court herein, namely:

First.—The Court erred in granting the decree entered in the above-entitled cause on the 20th day of January, 1902.

Second.—The Court erred in adjudging and decreeing that that certain act of the legislature of the State of California in the bill of complaint in said cause mentioned enacted March 14, 1899, entitled "An act to amend section three thousand six hundred and eight of the Political Code

of the State of California relating to the general revenue of the State and to property liable to taxation for the purpose of revenue, and to add new sections to be known as sections three thousand six hundred and nine and three thousand six hundred and ten also relating to the general revenue of the State and to property liable to taxation for the purpose of revenue," was and is constitutional and valid.

Third.—The Court erred in adjudging and decreeing that said last-mentioned act of the legislature is not contrary to the provisions of the fourteenth amendment of the Constitution of the United States, and not contrary to the provisions of section one of article XIII of the Constitution of the State of California.

Fourth.—The Court erred in adjudging and decreeing that said act of the legislature is not in violation of and repugnant to the provisions of section five thousand two hundred and nineteen of the Revised Statutes of the United States, in that the assessment and tax therein and thereby authorized and provided for is at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens in the State of California.

Fifth.—The Court erred in adjudging and decreeing that said act of the legislature did not and does not deprive complainant and the shareholders of complainant of their property without due process of law.

Sixth.—The Court erred in adjudging and declaring that said act of the legislature of the State of California was not and is not upon its face void for contradiction and inconsistency.

Seventh.—The Court erred in adjudging and decreeing that said act of the legislature of the State of California was not void as providing for and authorizing a mode of the assessment and taxation of shares of the capital stock of national banking associations different from that authorized and provided for the assessment and taxation of the shares of stock in corporations organized and acting under the laws of the State of California, and in adjudging and declaring that under the provisions of said act, the shares of the shareholders of complainant were not assessed at a greater rate than that authorized and provided for the assessment and taxation of shares of stock in corporations organized and acting under the laws of the State of California.

Eighth.—The Court erred in adjudging and decreeing that under the laws of the State of California and the fourteenth amendment to the Constitution of the United States, as well as the provisions of the Constitution of the State of California, the legislature of said State in and by the provisions of said act could lawfully authorize a mode of taxation of the shares of the capital stock of complainant other and different from and more burdensome than that authorized and provided for the assessment and taxation of other shares of capital stock in corporations organized and acting under the laws of the State of California.

Ninth.—The Court erred in adjudging and decreeing that in making the assessment in the pleadings herein complained of the Assessor of said City and County of San

Francisco did comply with the requirements of the provisions of section three thousand six hundred and nine of said act of the legislature.

Tenth.—The Court erred in adjudging and decreeing that said Assessor did not violate the provisions of said section three thousand six hundred and nine of said act of the legislature.

Eleventh.—The Court erred in adjudging and decreeing that said Assessor in making said assessment in the pleadings herein complained of did deduct from the value of the shares of the shareholders of complainant such sum as was or is in the same proportion to such value as the total value of the real estate and property exempt by law from taxation bears to the whole value of all the shares of the capital stock of complainant.

Twelfth.—The Court erred in adjudging and declaring that said Assessor in making said assessment was legally entitled to assess the corporate property of complainant other than real estate, and that although such property and all thereof has been adjudged and declared not subject to State taxation and should be deducted from any assessment made under the Constitution and laws of the State of California, that said assessment so made by said Assessor was not illegal and invalid, although it did include the same.

Thirteenth.—The Court erred in adjudging and declaring that in assessing the shares of the shareholders of complainant said Assessor was legally entitled in making such assessment to apply a rule of valuation different

from that applied in the assessment of all other property in the State of California, and particularly in the assessment of the property of corporations organized and acting under the laws of the State of California and more onerous and burdensome than that applied in assessing other moneyed capital in the hands of individual citizens of said State.

Fourteenth.—The Court erred in adjudging and declaring the assessment made by said Assessor as in the pleadings herein stated was not invalid, illegal and void, although in making the same said Assessor in assessing the shares of the shareholders of complainant applied the rule not of the valuation of the property of such shareholders, but supperadded thereto goodwill of the business of complainant and including in estimating the value of such shares the property under the Constitution and laws of the United States and of the State of California exempt from taxation and in respect to which said shareholders were not and are not liable to assessment and taxation.

Fifteenth.—The Court erred in adjudging and declaring that in making said assessment as in the pleadings alleged and admitted said Assessor did not act in contravention of the provisions of the fourteenth amendment of the Constitution of the United States and of the provisions of section five thousand two hundred and nineteen of the Revised Statutes of the United States, although in

making said assessment in allowing deductions said Assessor only allowed the par value of the United States bonds held and owned by complainant and not the premium added thereto, while in ascertaining the value of the shares of the capital stock of complainant said Assessor did include the amount of the premium upon said United States bonds and securities.

Sixteenth.—The Court erred in not granting the relief prayed by complainant in its original and several supplemental bills in the above-entitled cause.

Dated San Francisco, January 22, A. D. 1902.

T. I. BERGIN,

Solicitor for Complainant.

[Endorsed]: Filed January 22, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to wit, November Term A. D. 1901, of the Circuit Court of the United States of America, Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco on Wednesday, the 22d day of January, in the year of our Lord, one thousand nine hundred and two, the Honorable W. W. MORROW, Circuit Judge.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and JOSEPH H. SCOTT, as Tax Collector of said City and County,
Defendants.
No. 12,927.

Order Allowing Appeal.

Upon motion of T. I. Bergin, solicitor for complainant, and upon filing of a petition for an order allowing an appeal, an assignment of errors and an undertaking on appeal, approved in the sum of $500.00.—

It is ordered that complainant be, and it is hereby, allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree filed

and entered in the above-entitled cause on January 20th, A. D. 1902, and that a certified transcript of the record and proceedings herein be transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

WM. W. MORROW,
Judge.

[Endorsed]: Filed January 22, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and JOSEPH H. SCOTT, as Tax Collector of said City and County,
Defendants.
No. 12,927.

Undertaking on Appeal.

Whereas, The Nevada National Bank of San Francisco, complainant in the above-entitled cause, is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of the Circuit Court of the

United States in and for the Northern District of California entered in said suit on January 20th, A. D. 1902, in favor of the defendants therein, and against The Nevada National Bank of San Francisco aforesaid denying to said complainant the relief prayed in and by its original bill of complaint and its several supplemental bills of complaint in said suit filed:

Now, therefore, in consideration of the premises and of such appeal, the undersigned J. Henry Meyer and J. Freuler do hereby undertake and promise on the part of The Nevada National Bank of San Francisco aforesaid, appellant, that the said appellant shall prosecute its said appeal to effect, and if it fail to make its plea good, shall answer and pay to said Washington Dodge and Joseph H. Scott all costs that may be awarded against it on the appeal or on a dismissal thereof not exceeding the sum of $500.00 five hundred dollars, to which amount they acknowledge themselves bound.

J. HENRY MEYER,
J. FREULER.

State of California,
City and County of San Francisco. } ss.

J. Henry Meyer and J. Freuler being sworn, each for himself, says: That he is a freeholder in the Northern District of California and is worth the sum of $500.00 over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. HENRY MEYER,
J. FREULER.

Subscribed and sworn to before me this 22d day of January, A. D. 1902.

[Seal] JAMES M. ELLIS,

Notary Public in and for the City and County of San Francisco, State of California.

The foregoing undertaking is approved.

WM. W. MORROW,

Judge.

[Endorsed]: Filed January 22, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association,
Complainant,
vs.
WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and JOSEPH H. SCOTT, as Tax Collector of said City and County,
Defendants.

No. 12,927.

Certificate to Record on Appeal.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Cir-

cuit, in and for the Northern District of California, do hereby certify the foregoing pages, numbered from 1 to 164, inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the original citation issued in said cause is annexed hereto, and that the cost of the foregoing transcript of record is $102.25, which said sum was paid by The Nevada National Bank of San Francisco, Complainant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 31st day of January, A. D. 1902.

[Seal] SOUTHARD HOFFMAN,

Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States to Washington Dodge, as Assessor of the City and County of San Francisco, State of California, and Joseph H. Scott as Tax Collector of said City and County, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco,

in the State of California, on Monday, February 3d, A. D. 1902, pursuant to an order alowing appeal made and entered in the clerk's office of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, in a certain action numbered upon the register of actions of said Circuit Court No. 12,927, wherein The Nevada National Bank of San Francisco, a national banking association, is appellant, and Washington Dodge, as Assessor of the City and County of San Francisco, State of California, and Joseph H. Scott, as Tax Collector of said city and county, are appellees, to show cause, if any there be, why the decree rendered against said appellant as in the said order allowing appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honoıable WILLIAM W. MORROW, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this January 22d, A. D. 1902.

WM. W. MORROW,
Judge.

Service of the within citation and receipt of a copy thereof is hereby admitted this January 22, A. D. 1902.

FRANKLIN K. LANE.

[Endorsed]: Circuit Court of the United States, Ninth Circuit, Northern District of California. No. 12,927. The Nevada National Bank of San Francisco, Complainant, vs. Washington Dodge, as Assessor etc., et al., Defendants. Citation. Filed January 22, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

[Endorsed]: No. 794. In the United States Circuit Court of Appeals for the Ninth Circuit. The Nevada National Bank of San Francisco, a National Banking Association, Appellant, vs. Washington Dodge, as Assessor of the City and County of San Francisco, State of California, and Joseph H. Scott, as Tax Collector of said City and County, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the Northern District of California.

Filed January 31, 1902.

F. D. MONCKTON,
Clerk.

No. 794.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association, *Appellant*,

vs.

WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and

JOSEPH H. SCOTT, as Tax Collector of said City and County,

Appellees.

Appellant's Points and Authorities.

T. I. BERGIN,
Counsel for Appellant.

Bosqui Eng. & Print. Co., 523 Clay St., S. F., Cal.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT,

NORTHERN DISTRICT OF CALIFORNIA.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association, *Appellant*, vs. WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and JOSEPH H. SCOTT, as Tax Collector of said City and County, *Appellees.*	No. 794.

APPELLANT'S POINTS AND AUTHORITIES.

STATEMENT OF THE CASE.

This case presents the question of the constitutionality of the Act of March 14, 1899 (Stat., 1899, p. 96). The bill was filed against the Assessor to enjoin assessment of the shares of stock of the appellant, a national

banking association. It alleged, among other things, the mode and manner in which the Assessor intended to make the assessment under the provisions of this statute, that such mode and manner were in contravention of the provisions of the statute, and that the statute itself was unconstitutional and void upon the grounds therein set forth.

To this bill an answer was filed (Record, p. 31–49) substantially admitting the mode and manner in which the Assessor intended to make the assessment. Upon the bill an application was made for a preliminary injunction. Upon hearing of that application the Court was of opinion that a temporary injunction should not issue to restrain the Assesor from making the assessment (Record, p. 154), but leave was given to file a supplemental bill after the Assessor had made the assessment. Agreeably to such leave a supplemental bill was filed (Trans., p. 53–86) to which an answer was filed (p. 89–114). Thereafter a second supplemental bill was filed (p. 117–142) making Joseph H. Scott, Tax Collector, a party to the bill. Afterwards an agreed statement of facts was settled, signed and filed, stating the mode and manner in which the assesement had been made (p. 159–172). Upon final hearing upon the pleadings and this agreed statement of facts the Court decreed that complainant's bill of complaint, supplemental bill of complaint and second supplemental bill of complaint be dismissed (Record, p. 149).

From this decree the complainant has appealed.

Upon the final hearing in the Circuit Court complainant submitted the points and authorities subjoined hereto.

The appellees likewise submitted points and authorities, therein citing upon the question of due process of law

Hagar vs. *Reclamation District*, 111 U. S., 701–10.
Palmer vs. *McMahon*, 133 U. S., 660–69.
State Railroad Tax Cases, 92 U. S., 575–610.
Kentucky Railroad Tax Cases, 115 U. S., 330–2–3.
State vs. *Springer*, 134 Mo., 225–6.
Land Co. vs. *Minnesota*, 159 U. S., 626–37.
Lent vs. *Tillson*, 140 U. S., 324.
Cooley on Taxation, 364–5.
State vs. *Runyon*, 41 N. I. L., 98.

And further, taking the position that the grievance complained of in the bill was one of valuation, appropriate relief for which was furnished at the hands of the Board of Equalization, citing in support thereof

Henne vs. *Los Angeles County*, 129 Cal., 297–99.

In regard to these authorities on behalf of appellant the following answer was made:

DUE PROCESS OF LAW.

While the construction of the constitution and statutes of the State are within the peculiar province of the State tribunals, it is no less true that the determination of what constitutes due process of law is one the ultimate decision of which necessarily rests with the federal tribunals. Therefore, in such cases the State tribunals must yield to the decision of the federal courts.

See *Belcher* vs. *Chambers*, 53 Cal., 635–643.

The ground upon which the unconstitutionality of the statute here in question in this particular is asserted, is that the tax payer is not furnished with notice and opportunity to be heard. The Assessor makes the assessment without notice to him; his property is seized and sold without notice to him. He is afforded no notice or opportunity to be heard. Proceedings for the enforcement of the tax are not judicial; they are summary. In such cases the rule is that there must be notice and opportunity to be heard.

This distinction is recognized and enforced in the authorities to which counsel refer and is pointedly enforced in *Reclamation District* vs. *Phillips*, 108 Cal., 306.

See *Ex parte Lambert*, 22 Cal. Dec., 751.

This court, therefore, must determine this question for itself in light of the decisions of the Supreme Court of the United States. Any decision of the State Court to the contrary cannot avail to deprive the tax payer of the rights secured to him under the constitution of the United States.

In regard to the case of *Rode* vs. *Siebe*, 119 Cal., 521, we may remark that it is in direct conflict with the case of *People* vs. *Pittsburg Railroad Co.*, 67 Cal., 625. Under the constitution of the State of California, to constitute a valid tax there must be, first: An assessment by the local Assessor; second, the tax payer is entitled to be heard in support of his application to have this assessment equalized; third, there must be a valid law fixing the rate of taxation. These are three essential constituents entering into the creation of a valid tax under the constitution of the State of California. Under the constitution of California, the Tax Collector is only authorized to collect taxes. All these steps must have ripened into the creation of such taxes and have anteceded collection thereof by the Tax Collector. Before any rate has been fixed, before any assessment has been made, before the tax payer has had any opportunity to have his assessment equalized by the Board of Equalization, under the authority of *Rode* vs. *Siebe*, the Assessor is said to be authorized to make summary seizure and sale of the property of the tax payer in satisfaction of

a tax wanting in all of the constitutional constituent elements we have thus mentioned.

While the Supreme Court of the State is authorized, as already stated, to construe the statutes and constitution of the State, and its decisions thereon is authoritative in the federal courts, yet its decision that such proceedings constitute due process of law is not in the slightest conclusive upon this Court. This Court must, for itself, determine whether or not such proceedings constitute due process of law, and under the authorities to which the attention of the Court has already been called, we respectfully submit that it is not.

In regard to the position that this is a question of valuation, relief for which is furnished by the Board of Equalization, it is sufficient to say that it is the province of the Board of Equalization to equalize legal assessments, but it has no authority to pass upon the question of their legality.

P. M. S. S. Co. vs. *Board of Supervisors*, 50 Cal., 284.

In this case the question is the validity of the statute under which alone the assessment was made. Subsidiary to that question considerations bearing on valuation are relevant and proper for the purpose of showing that the act of the legislature is in contravention of the provisions of the act of congress authorizing assess-

ment of shares of the capital stock of national banking associations. It is in this respect alone such considerations have any bearing or are at all proper. But this does not show that such considerations are not proper, or that in consequence thereof relief can only be had upon application to a Board of Equalization.

The fundamental question is whether the statute under which the assessment was made is constitutional and valid or not, and this is a question of which the Board of Equalization constitutionally can have no cognizance.

EQUIVALENCY.

Upon this point counsel harp upon the case of *Burke* vs. *Badlam*, 57 Cal., 601, the correctness of which is not disputed. Its application is denied. The shareholders of appellant are entitled to the benefit of the rule announced in that case, but they are also entitled to the protection assured to them under the act of congress allowing the State to tax the shares of stock in national banking associations.

In *Burke* vs. *Badlam*, 57 Cal., 601, the Court correctly declared that:

"To assess all the corporate property of the corporation, and also to assess to each of the shareholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustees of all the stockholders, and again separately to the individual

stockholders in proportion to the number of shares held by each."

But the Court do not there decide or declare that the converse is true, namely, that the assessment of the shares of the stock of the corporation is the equivalent or only the equivalent of the assessment of the corporate property of the corporation. The question did not arise in that case; the Court was not called upon to decide it; the Court never did decide it. In this particular it is not authority. The Court cannot affirm that the converse of the decision in *Burke* vs. *Badlam* is either legally or in point of fact true. We have endeavored to enforce this in the points subjoined. To the extent of the difference between the actual value of the capital stock of the corporation and the actual value of the corporate property of the corporation, a discrimination is necessarily made against shareholders of national bank stock under the provisions of the statute. There is nothing in *Burke* vs. *Badlam* holding that the amount of this difference may not and does not exist. We know that it may and it does exist. We know that as to such difference stockholders in State corporations are not taxed, while shareholders in national bank associations are sought to be taxed.

Cotting vs. *Goddard*, 22 U. S. Sup. Ct. Rep., 30–43.

In the subjoined points we have already enlarged so much upon these questions that we forbear further remarks upon them. The Circuit Court filed no opinion, and we are therefore unable to conjecture the grounds upon which it denied the relief prayed for. Whatever may have been the grounds upon which it decided, its conclusion was erroneous, and we respectfully submit that its decree should be reversed and appellant awarded the relief prayed for in its several bills of complaint.

Dated Feb. 18th, 1902.

T. I. BERGIN,

Counsel for Appellant.

IN THE

Circuit Court of the United States,

NINTH CIRCUIT,

NORTHERN DISTRICT OF CALIFORNIA.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO,
Complainant,

vs.

WASHINGTON DODGE, as Assessor, etc., et al.,
Defendants.

POINTS AND AUTHORITIES FOR COMPLAINANT.

In the previous cause between the same parties, this Court was called upon to consider the amendments of March 14, 1899, to Sections 3608, 3609, and 3610 of the Political Code (Stats. 1899, p. 96). The Court disposed of that case upon the ground that those amendments did not go into operation in time to affect the assessment there in question. In this view it became unnecessary to consider the constutionality of these amendments, and the Court forebore to pass upon it.

That case upon appeal has been affirmed by the Circuit Court of Appeals. It is now final.

Dodge vs. *The Nevada National Bank*, 109 Fed. R., 726.

In this case, however, the constitutionality of these amendments is the controlling question. The Court is compelled to pass upon it in order to decide the case, and hence it becomes necessary to submit such views as we deem proper to show that these amendments are unconstitutional. It may not, however, be improper preliminary to the presentation of these views to make a few general remarks.

I.

It is undoubtedly true that it is a political duty incumbent upon every citizen to contribute to the support of the Government. This is, however, merely a political duty. In and of itself it has no legal operation. It affords no basis of legal action or defense. Taxes are the contributions of the citizen to the support of the Government. There are constitutional provisions governing the right and mode of levying them. The legislature in enacting revenue laws must pass such laws in conformity with the provisions of the constitution upon the subject. Where such laws are not in conformity to the requirements of the constitution, they are inoperative and simple nullities. The tax

must be assessed, levied and collected in conformity with the requirements of valid statutes authorizing the same. It is only upon strict compliance with the requirements of such laws that there arises a valid tax. Then and then only is the citizen charged with a legal liability to contribute to the support of the government. There is no rule more familiar and well settled than that in construing such laws they are to be strictly construed. The unvarying language of the courts upon the subject is that as proceedings to levy and collect taxes are in *invitum*, in virtue of which the citizen may be deprived of his property, there must be a strict construction of the statutes, and a strict compliance with their provisions. These views are too familiar to the Court to need citation of authority in their support, and we merely mention them to call the attention of the Court to them. With these remarks we proceed to state our positions.

II.

CONSTITUTIONAL SCOPE OF TAXATION.

In *McCulloch* vs. *The State of Maryland*, 4 Wheaton, 316–429, Chief Justice Marshall observed that:

"All subjects over which the sovereign power of a state extends are objects of state taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition

may almost be pronounced self evident. The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution the powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them. We find then, on just theory, a total failure of this original right to tax the means employed by the government of the Union for the execution of its powers. The right never existed, and the question whether it has been surrendered cannot arise."

The principle thus announced has ever since remained an axiom in constitutional law.

Section 3 of Article I. of the Constitution of California, declares that:

"The Constitution of the United States is the supreme law of the land."

Section 1 of Article XIII of the Constitution of California declares that:

"All property in this State, *not exempt under the*

laws of the United States, shall be taxed in proportion to its value, *to be ascertained as provided by law.*

This is the source and measure of the constitutional power of the legislature to enact revenue legislation. The declaration is not that all property in the State shall be taxed. Only certain property is to be taxed; all property in the State, not exempt under the laws of the United States. Upon the principle announced by Chief Justice Marshall rests this right of exemption from State taxation, and the exemption is co-extensive with the right itself. The property thus exempted is not subject to State taxation. Mere physical presence within the territorial limits of the sovereignty does not authorize the exercise of the power of taxation.

Van Brocklin vs. *Tennessee*, 117 U. S., 151.

Its exercise is limited by and co-extensive only with the sovereignty of which it is an essential attribute. Property exempt under the laws of the United States, independently of this constitutional declaration, would, under the Constitution of the United States, be exempt from State taxation; but, in order to render this exemption unmistakable and indubitable, the declaration was made in the Constitution of this State that such property shall not be subject to taxation.

In respect to such property, neither the legislature nor the State taxing officers have any authority upon

the subject of taxation. *It is entirely withdrawn from their jurisdiction.*

> *New Orleans* vs. *Houston*, 119 U. S., 275;
> *Douglas* vs. *Kentucky*, 168 U. S., 498.

Neither the legislature nor the State taxing officer is authorized to consider the same in dealing with the property that alone the Constitution declares shall be taxed. The constitutional injunction is *mandatory* and *prohibitory*. Its purpose must not be evaded, directly or indirectly. It matters not how or by whom the exempt property may be held, the exemption is equally obligatory. The exemption must be allowed in its entirety.

When, therefore, the legislature undertakes to enact revenue legislation, its authority to act is circumscribed by this constitutional limitation. It has no constitutional power to enact revenue legislation in respect to such exempted property. The constitutional declaration proclaiming its exemption from State taxation is, under the terms of the Constitution itself, *mandatory* and *prohibitory;* and, therefore, State legislation, under the provisions of the Constitution of this State, is wholly incompetent to legislate upon or affect by its revenue legislation any property exempt under the laws of the United States. The property that alone is taxable under the laws of the State of California is prop-

erty not exempt under the laws of the United States, and only in respect to such property has the legislature constitutional power to enact revenue laws.

In respect to property subject to State legislation the Constitution of California is not self-executing. Under the Constitution of California there can be no taxation without legislation. The constitutional mandate is that the taxable property of the State shall be taxed in proportion to its value to be ascertained as provided by law. Proportion to its value is a constitutional attribute of State taxation; but such value is to be ascertained as provided by law. Hence, there must be legislation before there can be constitutional taxation under the Constitution of California.

Under the constitutional principle thus announced by Chief Marshall, national banks are not subject to state taxation. The franchise to be a national bank is not subject to State taxation.

Owensboro National Bank vs. *Owensboro*, 173 U. S., 671;

National Bank of Louisville vs. *Louisville*, 174 U. S., 438–439;

First National Bank of Louisville vs. *Stone*, 174 U. S., 438–439.

While national banks are not subject to State taxation, Congress has declared that:

"The legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

United States Revised Statutes, Sec. 5219, 173 U. S., 668;
Owensboro National Bank vs. *Owensboro.*

This is the measure of the power of the State to tax national banks.

First National Bank vs. *San Francisco*, 129 Cal., 97.

The authority thus given is to tax, not the banks, but the shareholders; and the authority to tax shareholders is upon the express limitations thus declared by Congress.

Whenever, therefore, state legislation assumes to tax shareholders of national banks at a greater rate than other moneyed capital in the hands of individual citizens of such State, such legislation is unconstitutional and void.

People vs. *Weaver*, 100 U. S., 539;
Pelton vs. *National Bank*, 101 U. S., 146;
Evansville Bank vs. *Britton*, 105 U. S., 322;
McHenry vs. *Downer*, 116 Cal., 25;
Miller vs. *Heilbron*, 58 Cal., 133.

III.

DUE PROCESS OF LAW.

In *Railroad Tax Case*, 8 Sawyer's Reports, 275, the Court declared that,

"Whatever the character of the proceeding, whether judicial or administrative, summary or protracted; and whether it takes property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer the owner some opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding."

In *Hudson* vs. *Protection District*, 79 Cal., 94, speaking upon a statutory provision of this character, the Court say:

"It is argued that the owner of the land assessed has no opportunity under the act to be heard in regard

to the assessment, and that on non-payment his land will be sold without any opportunity to be heard as to this charge, which is declared to be a lien on his land and that he will thus be deprived of his property without due process of law.

"We think the point well taken. No provision is made anywhere in the statute for any hearing of the landowner whose land is to be charged. No notice is to be given him when the board of trustees is to levy the assessment, and if he appears when such assessment is to be levied by the board of trustees, no hearing by the board is provided for in the act. The collection provided for is summary, and without suit brought at which the property owner can be heard. The assessment is by the terms of the act made an absolute lien on his property, without any provision or opportunity allowed him to show its illegality or unconstitutionality.

"For these reasons, we are of opinion, according to well-settled rules, that the act is unconstitutional, and the assessment and sale under it can not be valid."

Section 3610 of the Political Code here in question expressly declares that,

"*No personal or other notice to such shareholders of such assessment shall be necessary for the purposes of this act.*"

Under the principle announced in the authorities

cited, this provision renders the statute unconstitutional.

Palmer vs. *McMahon*, 133 U. S., 668.

These authorities establish the right of the taxpayer to notice and opportunity to be heard in respect to his assessment. He is entitled to such notice, and without it proceedings to assess him are void, as depriving him of his property without due process of law.

Section 3610 not only does not make provision for such notice, but distinctly declares that no such notice shall be required. The only notice therein authorized or provided for is *notice to the bank*, *not notice to the stockholder*, expressly providing that no personal or other notice to the shareholders of such assessment shall be necessary for the purposes of this act. When the taxes are unsecured by real estate owned by the holder of the stock, then the bank is made liable therefor, and the assessor is authorized to collect the same from the bank, which may collect it from the stockholder. Thus a liability is finally and definitively fixed without any notice or opportunity to be heard. The only notice provided for is not a notice to the stockholder that an assessment is about to be made that he may have an opportunity to protect himself, but *a notice to the bank that an assessment has already been made*, with the express provision that no personal

or other notice to such shareholders of such assessment shall be necessary for the purposes of this act.

It is true that in

The People vs. *Pittsburg Railroad Co.*, 67 Cal., 625,

the Court held that,

"The legislature has no power thus to deprive the citizen of an opportunity of appearing before the Board (Board of Equalization) for the purpose of contesting the amount assessed against him,"

yet the statute can not be rescued from the taint of unconstitutionality upon the claim that the stockholder was thus constitutionally entitled to a right to appear before the Board of Equalization for reduction of the assessment made against him, for the reason that the amount fixed by the assessment of the assessor is conclusive under the statute, the provision being that in case the tax on any such stock is unsecured by real estate owned by the holder of such stock, then the bank in which such stock is held shall become liable therefor, and the assessor shall collect the same from said bank, which may then charge the amount of the tax so collected to the account of the stockholder owning such stock and shall have a prior lien to all other liens on his said stock and the dividends and earnings thereof for the reimbursement to it of such taxes so paid.

From this language it is evident that the amount the bank is liable for and the only amount that can be collected from it is the amount of the tax so fixed by the assessor.

This, and this alone, is the only amount, reimbursement of which is authorized under the statute. It is this amount and not any other or different amount. No provision is made that in case any change should be made in the assessment by any subsequent equalization, that the altered amount, and not the amount named by the assessor, shall be the amount the bank should pay and the stockholder should subsequently reimburse. The liability of the bank is, of course, a purely statutory creation. It is such as the statute has declared and none other. The bank can be held for no amount other or different from that expressly named in the statue. In this amount and in this amount alone is it, if at all, liable. This amount only is it authorized to appropriate out of the dividends and earnings of the stock of the stockholder. Nay, more, while the bank is thus declared liable for the amount it is so declared absolutely with a sole right of recourse for reimbursement to charge the amount of the taxes so collected to the account of the stockholder owning such stock with a right of prior lien on the stock and dividends and earnings thereof. Should the stockholder have no account with the bank, where is its

right to charge such account? Ownership of stock does not necessarily or at all place the stockholder in account with the bank. He may or may not have an account with the bank. Mere ownership of the stock creates no such account. The statute proceeds upon the assumption that the stock will be of equal or greater value than the amount of the tax, and that the bank will be able to reimburse itself out of its dividends and earnings, yet the stock may not have either dividends or earning and may not be of equal or greater value than the amount of the tax.

As already stated, the statute does not authorize or require the assessor to give notice of his intention to make the assessment. He is authorized by law to assess at any time between the first Monday of March and the first Monday of July. (Pol. Code, sec. 3628.)

Under sec. 3629 of the Political Code the assessor is required to exact from each person in his county the statement therein provided for. He has no authority to exact such statement except from residents of his county. His authority is confined to his county. He has no power to assess non-residents of his county.

Sec. 3633 of the same Code provides that where demand has been made of such statement, in case of neglect or refusal to furnish the same, the value fixed by the assessor must not be reduced by the Board of Supervisors, while sec. 3674 declares that no reduction

must be made in the valuation of property unless the party affected thereby, or his agent, makes and files with the Board a *written application therefor, verified by his oath*, showing the facts upon which it is claimed such reduction should be made. Recourse to the Board of Equalization in view of the language of sec. 3610, is not only unauthorized, but would be nugatory. A stockholder not only may not be a resident of the county, but he may not be a resident of the state, and thus may be powerless to enjoy the constitutional right of appealing to the Board of Equalization for reduction of the assessment. But as already stated, the language of sec. 3610 forbids all change or alteration of the sum fixed byt he assessor, and thereby necessarily exclude all authority of the Board of Equalization to alter or reduce the same as distinctly and unequivocally as if it had in terms so stated.

But the statute itself must contain provision for notice and opportunity to be heard.

In the matter of Lambert, Supreme Court of California, Record of December 6th, 1901:

Were not such the correct rule of constitutional law no statute could ever be declared unconstitutional upon this ground as the answer would always be that the constitution guaranteed the right and omission thereof in the statute could afford no ground of complaint.

Is not this depriving the stockholder of his property without due process of law? We think it is.

This we submit is an unauthorized exercise of power rendering the statute unconstitutional.

IV.

SECTION 3609 OF THE POLITICAL CODE AS AMENDED (Stats. 1899, p. 96) IS VOID FOR CONTRADICTION.

The language of the statute in this particular is:

"In making such assessment to each stockholder, there shall be deducted from the value of his shares of stock such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all of the shares of the capital stock in said national bank."

What does this provision mean? The franchise of the national banking association is exempt from state taxation.

In *Covington State Bank* vs. *Covington*, 21 Fed. Rep., 489, the Court held that the United States Revised Statutes do not permit taxation of the corporate property of the corporation, except its real estate. This decision is approved in

People vs. *National Bank of D. O. Mills*, 123 Cal., 53–61.

City and County of San Francisco vs. *Crocker-Woolworth National Bank*, 92 Fed. Rep., 273.

First National Bank of San Francisco vs. *City and County of San Francisco*, 129 Cal., 94.

Rosenblatt vs. *Johnston*, 104 U. S., 462.

Under the decisions, therefore, of the Supreme Court of the United States and the Supreme Court of this State, the corporate property of the corporation, except real estate, is exempt from taxation, and is not an element of the taxable value of its property. The constitution of this State itself declares that it is not within the domain of the legislature to tax.

Now, applying the rule for assessment declared in sec. 3608 of the Political Code, that the shares of stock in corporations possess no intrinsic value over and above the actual value of the corporate property of the corporation, which they stand for and represent, can there be any taxable value in the shares of stock in a national bank? Make the deduction directed by the statute, and apply the rule enjoined for assessment of the corporate property of state corporations, and it is evident that, necessarily, a different rule of valuation is applied in valuing the shares of shareholders in national banks from that applied in valuing the corporate property of state corporations, and that, what alone is

left subject to assessment as against him, is declared not subject to assessment in respect to the stockholder in a state corporation.

This amount is what is declared the assessable value of the franchise of the State corporation. It is assessed as the property of the corporation. It is the property of the corporation. So also is the franchise of the national bank not the property of the shareholders but of the bank. It is beyond the reach of assessment equally as well as the United States bonds the bank may hold. The shareholder is therefore entitled to the benefit of its immunity from State taxation as well as he is entitled to the benefit of the immunity of the United States bonds held by the bank.

The declaration upon this subject contained in sec. 3608, and the declaration contained in sec. 3608, last referred to, are obviously variant from each other, the one declaring that shares of stock in a corporation possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the other that the shares of stock of national banks possess an assessable value over and above such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares of the capital stock in said national bank, thus recognizing a difference be-

tween the value of the shares of stock in a national bank and the value of its corporate property, while declaring that, in respect to a State bank, no such difference exists; that, in respect to national banks, the amount of such difference is assessable to the stockholders in national banks, while in respect to stockholders in State corporations, the same is unassessable.

In the case at bar it stands admitted that the complainant has not and never has had or owned any real estate. All its corporate property is other than real estate, and under the authorities to which we have called attention, is exempt by law from taxation. It is exempt under the Constitution of the United States; it is exempt under the Constitution of this State; it is exempt under the Act of Congress, and can constitute no element in the assessment of the shares of stock of its stockholders.

Thus is presented the case of a legislative mandate to assess, and in the same breath a legislative mandate to exempt from assessment the sole subject of assessment. This contradiction renders the statute inoperative and void.

Were authority necessary upon this point, we find it in the

Farmers' Bank vs. *Hale*, 59 N. Y., 53.

The Court there held the statute inoperative, declaring that,

"It (the statute) declares the intent and meaning to be to place state banks on an equality with national banks under the national act. Equality means the same rights and privileges and the same forfeitures, and it means nothing else. If this expressed meaning is to prevail, the state banks can have no other or different rights, nor be subject to any other or different forfeitures than national banks. It follows that if national banks were, notwithstanding the national act, subject to the usury laws of the state, the state banks are also, or else the declared meaning of equality is nugatory It is said that this renders the statute inoperative and that this result must be avoided. This is plausible, but not a valid or sound position. There is nothing in the Constitution nor in any legal principle to prevent the legislature from passing an act with provisions which render it inoperative."

State vs. *Partlow*, 91 N. C., 552;
Richards vs. *McBride*, L. R., 8 Queen's Bench, Div. 119;
Blanchard vs. *Sprague*, 3 Summer, 279.

Nor is it any answer to say that,

"When, therefore, it becomes manifest from a review of the revenue laws of California as construed by her courts, that the deductions to be allowed under this section of the act were to be so allowed for the purpose of avoiding a possible discrimination against

national banks, it is fair to consider the exemptions permitted state banks in order to determine what exemptions are intended to be allowed national bank stockholders. When the purpose and intent of the act is kept in mind, no difficulty is experinced in giving to this provision a rational and correct interpretation."

This is an absolute departure from the language of the statute. It is substitution of a rule different from that expressed in the statute where the language of the statute is clear and unambiguous. The property exempt by law means not the property of state banks, but of national banks. The context and terms of the statute unmistakably show this. The legislature is here treating of taxation of shares in national banks and the exemptions to be allowed in such taxation. Coupling the real estate of the bank with property exempt by law from taxation unmistakably shows what was in the mind of the legislature and of what it was speaking. To mention real estate of a state bank in this connection would be idle and insensible, but to mention it in connection with national banks, is at once intelligible and proper. The real estate of such banks is taxed, as is all other real estate, and hence not to exclude it would be palpable double taxation. The language is,

"The total value of its real estate and property exempt by law from taxation."

The real estate and property exempt by law from taxation are coupled together and placed upon the same plane, the one no less than the other must be deducted. National banks are entitled to exemptions. What are they? The authorities cited declare what they are. Counsel admit they are entitled to some, but insist that to allow them all to which these authorities declared they are entitled, would render the statute insensible. Admittedly federal bonds and securities are excluded. Why? Because under the law they are exempt from state taxation. Yet under the decisions to which we have called the attention of the court, the other property is under the law equally exempt from taxation. Upon what principle is one class of property to be excluded and the other not? Where is the authority for drawing the distinction? We confess we know of none. But what at once shows the untenability of this position is that the legislature had not the power, if it had the purpose, to limit or enlarge the extent of the "*property exempt by law from taxation*" for the constitution of the state as well as that of the United States had already placed the subject beyond the reach of legislative interference.

As already stated, *such property was exempt from taxation under both state and national constitution and wholly withdrawn from the domain of state legislation upon the subject of taxation.*

Applying the rule for assessments declared in sec. 3608 of the Political Code, that the shares of stock in corporations possess no intrinsic value over and above the actual value of the corporate property of the corporation which they stand for and represent, can there be any taxable value in the shares of stock in a national bank? Make the deduction directed by the statute, and apply the rule enjoined for assessment of corporate property of state corporations, and it is evident that, necessarily, a different rule of valuation is applied in valuing the shares of shareholders in national banks from that applied in valuing the corporate property of State corporations, and that, what alone is left subject to assessment as against him, is declared not subject to assessment in respect to the stockholder in a State corporation.

The declaration upon this subject contained in sec. 3608, and the declaration contained in 3609, last referred to, are obviously variant from each other, the one declaring the shares of stock in a corporation possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the other that the shares of stock of national banks possess an assessable value over and above such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the

whole value of all the shares of the capital stock in said national bank, thus recognizing a difference between the value of the shares of stock in a national bank and the value of its corporate property, while declaring that, in respect to a State bank, no such difference exists; that, in respect to national banks, the amount of such difference is assessable to the shareholder in national banks, while in respect to stockholders in State corporations, the same is unassessable.

V.

SECTIONS 3608, 3609 AND 3610 OF THE POLITICAL CODE AS AMENDED ARE VOID AS MAKING INJURIOUS DISCRIMINATION AGAINST NATIONAL BANKS.

Before entering upon discussion of this point, we desire to premise a few remarks in respect to decisions of the Supreme Court of the United States, that will doubtless be called to the attention of the Court in the course of this discussion.

In various cases, of which *Aberdeen Bank* vs. *Chehalis County*, 166 U. S., 440, is an illustration, the Supreme Court of the United States has been called upon to determine whether or not exemptions allowed by state laws could operate as a discrimination in the assessment and taxation of shares in national banks. In

these decisions, the Court established the position that where its constitution permits the state legislature may make such exemptions from taxation as in its wisdom it may deem proper, and that such exemptions will not operate to create an injurious discrimination in the assessment and taxation of the shares in national banks, that the rule regarding such discrimination can only operate in respect to property *subject to taxation* under the laws of the state *that comes in competition with the business of national banks*, and that it is only in respect to such property the rule against discrimination can have any application. This, of course, is not the question in the case at bar. We are dealing here with a question of the assessment and taxation of property subject to taxation, and considering whether or not in respect to such property any such injurious discrimination is made. We pass, therefore, to the question of the constitutionality of these sections in the Political Code.

Section 3608 declares that:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also the corporate property, would be double taxation. Therefore, all property belonging to corporations, save and except the property of national banking associa-

tions not assessable by federal statute, shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation, save and except in national banking associations, whose property, other than real estate, is exempt from assessment by federal statute."

Under the provisions of this section, the stockholder in a state corporation is not subject to taxation. The corporate property of the corporation is alone subject to taxation.

The constitutionality of this statute was affirmed in

Burke vs. *Badlam*, 57 Cal., 594.

City and County of San Francisco vs. *Mackay*, 10 Sawyer, 302.

County Commissioners vs. *Farmers' and Mechanics' Bank*, 48 Md., 117.

Germania Trust Co. vs. *San Francisco*, 128 Cal., 594.

The rule is familiar, that the decisions of the Supreme Court of the State, construing its constitution and statutes, are binding upon the Federal Courts.

Upon the provisions of this section we may remark that

First. Shares of stock in State corporations are declared to possess no intrinsic value over and above the actual value of the property of the corporation.

Second. Assessment and taxation of such shares and also the corporate property would be double taxation.

Third. All property belonging to State corporations alone shall be assessed and taxed.

Fourth. No assessment shall be made of shares of stock in State corporations.

The rule thus provided in respect to State corporations is declared inapplicable to national banking associations. While the State corporation is alone assessable under its provisions, there is no authority for assessing national banking associations. Of course, had there been, it would have been idle, as the State has no power to authorize assessment of the same.

It will be observed that the statutory declaration, and the decision of the Court in *Burke* vs. *Badlam*, 57 Cal., 594, that shares of stock possess no intrinsic value, is at variance with the well-settled decisions of the Federal Courts, the last of which is contained in the Owensboro case, in 173 U. S., 671; yet, it having been enacted by the legislature, and the constitutionality of that enactment having been affirmed by the Supreme Court of the State, it is binding upon all persons within the State of California subject to its jurisdiction; and all such persons are entitled to invoke the benefit of its provisions. The shareholder in a na-

tional bank association is no less entitled to its benefit than the stockholder in a State corporation.

In these particulars, therefore, this section of the Political Code discriminates between shareholders in national bank associations and stockholders in State corporations:

1. The stock of the one is subject to State taxation; the stock of the other is not.

2. The statutory rule as to the value of stock is made applicable to State corporations, and declared inapplicable to national banking associations.

3. The corporate property alone of State corporations is assessable, while, of course, there is neither provision nor authority for assessing the corporate property of national banking associations.

First National Bank vs. *San Francisco*, 129 Cal., 96.

Shareholders in national bank associations are entitled to the benefit of the rule announced in *Burke* vs. *Bidlam*, as embodied in this section of the statute. Only by applying that rule to shareholders in national bank associations can they stand upon equality with stockholders in State corporations. If the rule of valuation in respect to the one be more onerous than the rule of valuation in respect to the other, to the extent of such difference there is necessarily an injurious discrimination. If the value of the shares of stock be

greater than the actual value of the corporate property of the corporation as applied to shareholders in national banking associations, to the extent of such difference over and above the actual value of the corporate property there will be an injurious discrimination against the shareholders in national banking associations, rendering the statute unconstitutional.

Instead of applying to them the rule applied to State corporations, a different and a more burdensome rule is applied. That there is a difference between the two rules and that such difference is material and injurious will readily appear.

In regard to State corporations, nothing but property is assessed. The provision for its assessment is the same as that for the assessment of individual property.

The only element entering into it that is property permissable in its assessment is the value—its actual cash value according to the definition prescribed by the statute—the amount at which the property would be taken in payment of a just debt due from a solvent creditor (Pol. Code, Sec. 3617, Sub. 5).

> *Kishlar* vs. *Southern Pacific Railroad Co.*, Supreme Court of California, Record for Dec. 6th, 1901.

In addition to this, in assessing the corporate property of the corporation, the corporation is entitled to all the exemptions allowed by law. Federal bonds and

Federal securities that it may hold must be deducted in assessing its corporate property. They are entitled to all the deductions authorized by the provisions of paragraph six of section 3629 of the Political Code; that is to say, "all solvent credits, unsecured by deed of trust, mortgage or other lien on real or personal property, due or owing to such person, or any firm of which he is a member, or due or owing to any corporation of which he is president, secretary, cashier, or managing agent, *deducting from the sum total of such credits* such debts only, unsecured by trust deed, mortgage or other lien on real or personal property as may be owing by such person, firm or corporation, to bona fide residents of this State."

Under authority of this provision, State banks are entitled to, and do, deduct the amount they owe to their depositors from the amount due them. If a corporation owns property exempt from taxation, it is entitled to claim the exemption. In fact, the Constitution, declaring what property shall be taxed, excludes property exempt under the laws of the United States from the taxable property of the State.

The sum, therefore, of the assessable value of the corporate property of State corporations is the amount of the value of corporate property remaining after making these deductions therefrom.

It is true that it is claimed that under the provisions

of paragraph six of sec. 3629 of the Political Code the right to such deductions is dependent upon compliance with the terms therein prescribed. That in absence of compliance with these requirements the taxpayer will not be entitled to the benefit of its provisions. This is undoubtedly true. But under its provisions all persons desirous of availing themselves thereof are entitled to do so, and their failure to comply with requirements thereof so as to entitle themselves to the benefit of its provisions, in no wise invalidates them or creates any injurious discrimination to a legal intent between the persons who may so comply and those who may fail to do so. The difference that may result from such neglect is not the fault of the law, but the default of the parties themselves, of which they are not entitled to complain. But where the *right* to thus entitle themselves to the benefit of such deduction *is not accorded*, then the *statute itself makes the discrimination that renders it injurious.* Such discrimination does not result from the act of the party, but from the provision of the law itself. While he may not complain of the one, he is justly entitled to complain of the other. While in the one case there may be no violation of his constitutional rights, in the other there will be a palpable discrimination to his detriment. In the one case there will be a violation of the provisions of section 21, article I., of the Constitution of California, read-

ing: "Nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens;" and in the other, there will be no such violation. The distinction between the two cases is obvious. It is recognized and endorsed in

Whitbeck vs. *Mercantile Bank*, 127 U. S., 199,

and enforced in

Miller vs. *Heilbron*, 58 Cal., 138.

The validity or invalidity of the statute upon this subject can not depend upon the compliance or non-compliance with its requirements. If the statute be constitutional the action or inaction of the party will be wholly immaterial, and the action or inaction of the party can never render the statute constitutional.

Such, therefore, is the sum of the assessable value of the corporate property in a State corporation under the laws of the State.

Stock, however, is valued in an entirely different way. The value of the stock of a corporation not only depends upon the value of the corporate property, but also upon the skill and efficiency with which its business is conducted, the character of the business, its value, remunerative nature, and various other elements entering into the value of a successful business. The cash value of the plants of two corporations may be precisely the same intrinsically, yet the stock of the

two corporations may differ greatly in market value; the one enterprise may not be a success, the other may be prosperous and profitable; the one may have to levy assessments while the other is declaring dividends to its stockholders.

As the Court say in *McMahon* vs. *Palmer*, 12 Daly, 364:

"The shares are held, bought and sold at pleasure; their value is decreased or lessened by factors not directly affecting the capital. If the corporation pays dividends, the stock appreciates; if not it declines. Share value depends upon the successful or unsuccessful use of capital and business management. Were there no difference between stock and capital, the valuation of the former would depend solely upon the increase or decrease of the latter. *The value of any successful business may be far in excess of the capital invested and the holder of corporate stock shares possesses more than the right to a proportionate part of the corporate property, i. e., his quota of the profit.*"

Owensboro National Bank vs. *Owensboro*, 173 U. S., 664, 667.

Evidently, therefore, when the stock of the corporation is assessed, and not its corporate property, the assessment of the stock will embrace and include elements not at all entering into the assessment of the

property. The difference in amount between these respective elements is necessarily a discrimination against the shareholders in national banks, and this discrimination necessarily results from really assessing the stock and not the corporate property of the corporation. It stands admitted in this case that all these elements combined or entered into consideration, and in ascertaining the value of the stock of complainant (*Vide* paragraph 9 of Bill of Complaint).

The rule, therefore, applicable to the property of the stockholder in a state corporation, or in a state bank, is not the equivalent of the rule made applicable to shareholders in national banking associations.

It is true that franchises are assessable under the Constitution and laws of the State of California, and that this element of difference between the value of the corporate plant and the market value of the stock is treated as the value of the franchise, as in

Spring Valley W. W. vs. *Schottler*, 62 Cal., 117, where the Court say:

"It appears from the record in this case that the Board of Supervisors, in the exercise of its power of equalization, assessed the franchise of the Water Works by taking the aggregate of the market value of the shares of stock in the company on the 7th of March, 1881, and deducting therefrom the value of the real and personal property of the company, and

held the difference to be the value of the franchise. The market value of the shares was shown to the Board by the testimony of witnesses. Such a mode of arriving at the value of the franchise appears to have been adopted by the assessor in *San Jose Gas Co.* vs. *January*, 57 Cal., 614, and this mode was held to be within the powers vested in the assessor. It was also impliedly approved as a current mode in *Burke* vs. *Badlam*, above cited (see *Commonwealth* vs. *Hamilton Mfg. Co.*, 12 Allen, 306)."

The State Court thus recognizes this difference as constituting the measure of value of the franchise of the corporation. Yet, as we have seen, as to national banks, this is a subject not liable to assessment or taxation under State law. Of course, were it material to here consider the question as to whether or not the charter of a mere private corporation constitutes a franchise subject to assessment and taxation under the Constitution of California, we should not by any means be prepared to concede that point, but as the question is in no wise involved in this case, we do not deem it necessary to further refer to the subject.

There is another view of the matter, showing that the shareholder in a national bank association is entitled equally with any other citizen of the State to the benefit of the constitutional and statutory rule of taxation to which other citizens of the State are entitled,

and that he is not liable to be subjected to any greater burden of taxation than any other citizen in the State.

A corporation is merely an authorized aggregation of individuals formed for the conduct of its business. The artificial person thus arising is still but the representative of the individuals constituting it, and they are equally entitled in the conduct of their business through corporate form to the benefit of all the protection of the law as if they had not in corporate form engaged in the management of their business.

As the Court say in *Gulf, Colorado & Santa Fe Ry.* vs. *Ellis*, 165 U. S., 154:

"The rights and securities guaranteed to persons by that instrument (Fourteenth Amendment of the Constitution of the United States) cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations equal protection of the law than it has to individual citizens."

Applying the rule thus announced to the case of the stockholder in the National Bank Association, and the unconstitutionality of the statute will at once be manifest. Here are two classes of men engaged in the same line of business. One class is conducting its business

under State corporate form; the other under national corporate form. In all other respects they are the same. They are the same citizens; they own the same property; they are engaged in the same business; they are liable to the same burdens of taxation; they are entitled to the same statutory and constitutional exemptions. The only difference between them is that one is acting under State and the other under national authority. While this may constitute distinction sufficient to authorize certain classification for the purposes of taxation, it does not authorize or furnish the basis for imposing different burdens of taxation, nor for imposing a more onerous burden of taxation upon the men doing business under national authority than is imposed upon the men doing business under State authority.

Equality of burden is the absolute right of all. This equality of burden cannot be arbitrarily destroyed under guise of classification. The proprietary interest of the shareholder in a national bank association should not be charged with any greater burden than is the proprietary interest of a stockholder in a State corporation. Owing to the distinctive and different authority under which they act, the mode of determining the burden may be different; but, while the mode may be different, the burden cannot be made unequal. The attempt to do so would be violative of the constitutional

equality secured to the shareholder in the national bank association, under the Constitution and laws of the State of California, as well as under the Constitution and laws of the United States.

The rule of valuations, therefore, applied under the statute to national bank associations constitute an invasion of the rights and an injurious discrimination against the interest of their stockholders.

Again, the shareholder in the national bank association is entitled to all constitutional and statutatory rights and immunities that the stockholder in a State corporation is. What they are we have already measurably called to the attention of the Court. Apply them to the interest of the shareholder in a national bank association. As we have seen, all property exempt under the laws of the United States is withdrawn from and not subject to State taxation. It matters not by whom such property may be held or owned. It is thus exempt whether owned by individuals or a corporation.

As already stated, the complainant has not and never did own any real estate, and its corporate property is exempt under the laws of the United States. It is not the subject of State taxation. The franchise of the association to be a corporation is not the subject of State taxation. In respect to State corporations and citizens generally, all these proprietary elements are

withdrawn from the domain of State taxation. How then, or upon what principle are they rendered amenable to State taxation because owned and held by a shareholder in a national bank? Can this be otherwise than upon the basis of an injurious discrimination against such association? Not at all. Where can there be any taxable value in his stock after withdrawal of all these constituent elements of value from it? Evidently none. Yet while such is the behest of the constitution and the statutes of this State, the assessor has levied a tax upon the shares of the shareholders of complainant, representing a large amount in value.

Another respect in which the interests of the shareholder in the national banking associations are injuriously affected is in that they are not authorized to demand deductions from their solvent credits of the amount of their debts due to bona fide residents of the State of California.

In the cases of *Miller* vs. *Heilbron*, 58 Cal., 133, and *McHenry* vs. *Downer* 116 Cal., 20, the Court declared the rule sought to be applied to the assessment of shares in national bank associations invalid, because in making such assessments deductions were not authorized to be made as provided in paragraph six of section 3629 of the Political Code.

The language of section 3609 upon this point is:

"That in the assessment of such shares each stockholder shall be allowed all the deductions permitted by law to the holders of moneyed capital in the form of solvent credits in the same manner as such deductions are allowed by the provisions of paragraph six of section 3629 of the Political Code of the State of California.

Does this provision obviate the objection held fatal in *Miller* vs. *Heilbron*, 58 Cal., 133, and *McHenry* vs. *Downer*, 116 Cal., 20?

Apart from the declaration contained in this amendment, the stockholder, under the law, would be entitled to the deductions allowed by paragraph six of Section 3629 of the Political Code. This declaration accords him no greater measure of right than he would be entitled to without it. The amendment fails to obviate the difficulty. The real difficulty was and is that the stockholder in a State corporation individually was entitled to the benefit of this exemption, and the corporation itself was equally entitled to the benefit of this exemption. Thus a stockholder in a State bank not only gets the benefit of the deduction of all that he may personally owe to bona fide residents. but also the benefit of the deduction of all that the corporation may owe to such bona fide residents. National bank associations, not being subject to State taxation, are not, as State banks are, in a position to claim the benefit of this right to deductions.

The amendment does not give the stockholder in national banking associations the benefit thus secured to the stockholder in the State bank, through the assessment being made against the corporate property of the corporation. It contains no declaration that in making the assessment he shall be allowed, not only the benefit of the deductions provided for in paragraph six of sec. 3629 of the Political Code to himself personally, but also his proportion of the deductions to which the banking association would have been entitled were it a State and not a national institution.

For instance, in *Burke* vs. *Badlam*, 57 Cal., 601, the Court say:

"To assess all the corporate property of the corporation and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each."

In the conduct and management of the business of a bank there will necessarily be a large amount of debts due to *bona fide* residents of the State. A State bank is authorized to deduct the amount of such indebtedness from the amount of taxable credits. The national bank is not thus allowed. The trustee of one class of

stockholders is allowed to make the deduction; the trustee of the other class of stockholders is not allowed to make the deduction. The discrimination is patent. The stockholder in the State bank is allowed to make the deduction; the State bank is allowed to make the deduction. The shareholder in the national bank is individually entitled to make the deduction. The national bank is not entitled to make the deduction, nor is the shareholder entitled to make the deduction on account of his proportionate interest in the bank.

What provision is made for such allowance in the amended section of the statute? None. The objection, therefore, held good in *Miller* vs. *Heilbron* and *McHenry* vs. *Downer* still remains and is equally fatal to the attempt to tax the shares of stock in national banks. Stock is not now any more than it was then a solvent credit.

Dutton vs. *Bank*, 53 Kans., 440–463;
First National Bank vs. *Ayres*, 160 U. S., 660–664;
Commercial Bank vs. *Chambers*, 182 U. S., 560;
McHenry vs. *Downer*, 116 Cal., 20–27–29.

Its terms will no more authorize the shareholder of a national bank to now claim deduction from the value of his stock deduction of his proportionate share of the debts of the bank to *bona fide* residents of this State

than they did before the enactment of the statute of March 14, 1899.

In a still further particular sec. 3610 of the Political Code injuriously discriminates against the shareholder in national bank associations. We have already called the attention of the Court to the principle that the tax-payer is entitled to notice and an opportunity to be heard in respect to the assessment of his property.

Railroad Tax Case, 8 Sawyer, 275.

Under the Statute of California, he is entitled to have the assessment of her property equalized as well as the assessment of the property of the state equalized, so that the burdens of taxation may be fairly and equitably distributed among the tax-payers of whom he constitutes one.

People vs. *Pittsburg Railroad Co.*, 67 Cal., 625.

Of this right he is deprived under the provisions of Sec. 3610 of the Political Code. This section requires the assessor within ten days after he has made his assessment, to give written notice to the banking association of such assessment of the shares of its respective shareholders, and no personal or other notice to such shareholders of such assessment shall be necessary for the purposes of this act, and where the tax on such stock is unsecured by real estate owned by the holder of such stock, then the bank in which the stock is held

shall become liable therefor, and the assessor shall collect the same from said bank. This he may do summarily at any time before the first Monday of July. At any time before that date he may collect the taxes by seizure and sale of any personal property of the shareholder. (Pol. Code, sec. 3821.) He may in like manner enforce collection of the amount from the bank. This amount he is authorized to collect from the bank. This amount the bank is authorized to pay, assuming the validity of the statute. This amount, and this amount alone, is the bank authorized to charge to the account of the stockholder, with a right to have a lien prior to all other liens on the stock and the dividends and earnings thereof for the reimbursement to it of such taxes so paid

Under the decision of this Court that was affirmed in the Circuit Court of Appeals the stock alone liable to assessment for any fiscal year is that owned on the first Monday of March of the year. The stockholder who then owned it alone is liable to assessment therefor. There is no provision of law impounding the stock on the first Monday of March. It does not cease to be negotiable; it does not cease to be vendable; it it does not cease to be transmissible. Ownership of the stock may change. The assessor may assess at any time between the first Monday in March and the first Monday in July. How the bank is to protect itself

in view of these indubitable legal rights of the shareholder, it is difficult to conceive. The assessment can legally only be made against the shareholder owning the stock on the first Monday of March. (*People* vs. *National Gold Bank*, 51 Cal., 508.) The bank can only pay the tax upon the assessment where legally made. Necessarily, therefore, it would be bound at its peril to ascertain and determine that when the assessor made his assessment the person who owned the stock on the first Monday of March continued his ownership up to the time of the making of the assessment.

As already stated, the bank is only entitled to pay, and can only pay the amount in which the assessor assesses the tax. This is the only amount that he can charge in account against the account of the shareholder, if he can be discovered, and if he have an account with the bank, and there is no provision of law for the payment of any other or any different sum. Where then is the constitutional right of the shareholder to equalization of the assessment? Of what avail would it be to him? Does not the nature of the proceeding show that the amount named by the assessor was designed to be absolute and final, not liable to be altered or changed upon proceedings for equalization of the assessment? Is not this a discrimination against the shareholder in national bank associations? Is not this denying to him a right secured

to all other taxpayers? Does not the statute in this respect injuriously discriminate against him?

Nor is it any answer to these views to say that the act of Congress authorizes taxation of the shares of the shareholders in national banks, and that it is well settled by the decisions of the United States Supreme Court,

"That the property of shareholders in their shares and the property of the corporation in its capital stock are distinct property interests, and where that is the legislative intent clearly expressed that both may be taxed."

New Orleans vs. *Heaston*, 119 U. S. 277,

for the reason that while the act of Congress authorizes such taxation, it at the same time requires that such taxation shall not be at a greater rate than upon other moneyed capital in the hands of individual citizens, thus coupling with the authority to tax the limitation thereon that the burden shall not be greater as to individual shareholders in a national bank than as to the stockholder in a state corporation.

In the *National Bank* vs. *Commonwealth*, 9 Wall., 353–363, where the Court upheld the power of the State of Kentucky to tax the shares of stock in the National Bank, the Court say:

"It is said here in argument that the tax is void because it is greater than the tax laid by the State of

Kentucky on other moneyed capital in that State. This proposition is not raised among the very distinct and separate grounds of defense set up by the bank in the pleading, nor is there any reason to suppose that it was ever called to the attention of the Court of Appeals, whose judgment we are reviewing.

"We have so often of late decided that when a case is brought before us by a Writ of Error to a State Court, we can only consider such alleged errors as one involved in the record and actually received the consideration of the State Court, that it is only necessary to state the proposition now as the question thus sought to be raised here was not raised in the Court of Appeals of Kentucky, we cannot consider it."

The question is here distinctly presented. There is no escape from its decision. The constitutional rule of assessment of property in this State is thoroughly established. Every one is entitled to the benefit of it. No one can be righfully deprived of the benefit of it. One rule upon this subject cannot be made to apply to one class of tax payers and another apply to another. Shareholders in national banks are entitled to the benefit of this rule equally with every other tax payer. The legislature could not, if it would, deprive them of the benefit of it. It is a principle of the constitutional law of this State that no such discrimination can be made.

Johnston vs. *Goodyear Mining Co.*, 127 Cal., 9;
Krause vs. *Durbrow*, 127 Cal., 684;
Ex Parte Clancy, 90 Cal., 553–558;
City of Pasadena vs. *Stinson*, 91 Cal., 248–249;
Cullen vs. *Glendora Water Co.*, 113 Cal., 512–513–514.

While, therefore, the interests of the shareholder in a national bank association may be liable to taxation under the Constitution and laws of this State, the burden of taxation imposed upon his interest cannot be greater than that imposed upon the interest of any other taxpayer in the State, and he is entitled to the enjoyment of all the rights, constitutional and statutory, that every other tax payer is entitled to.

The decisions of the Supreme Court of the United States making the distinction between the property of shareholders in their shares, and the property of the corporation in its capital, cannot avail to impair or affect these rights.

New Orleans vs. *Houston*, 119 U. S., 275.

While we may admit the distinction thus drawn and concede that the interest of the shareholder in national banking associations may be subject to taxation, yet such interest must be assessed according to the principles, constitutional and statutory, governing the assessment and taxation of all other property in the State.

Equality of burden is the constitutional right of the tax payer. It matters not whether that tax payer be a stockholder in a state or in a national bank; it matters not in what his property may consist. The mode of assessment, the manner in which the burden may be levied, imposed and enforced, are mere modal questions not affecting the vital one of equality of burden. In face of this fundamental and constitutional right, mere modes of procedure must give way. That can never be allowed to override or impair the ultimate right of equality of burden.

As we understand, appellant's brief in reply in No. 667 in the United States Circuit Court of Appeals for the Ninth Circuit, Washington Dodge, as assessor, etc., vs. The Nevada National Bank of San Francisco, etc., is to be submitted as part of the argument of this case, it may not be improper to make a few remarks upon some of the points advanced in that brief.

The position (p. 14) that it is inequitable for a tax-payer to invoke the aid of a Court of Equity to protect his property against an unauthorized and unconstitutional assertion of tax power, has the merit of novelty. The tax-payer is entitled to the benefit of the constitution in its entirety and is entitled to demand that no tax shall be imposed upon his property in contravention of any of its provisions. The provisions of the constitution are mandatory and prohibitory, and where there has been legislation transgressing any of them

under which the tax is sought to be levied upon his property, he is entitled to invoke the aid of equity in a case otherwise presenting equitable grounds for its interposition. Assumption that any provision of the statute may have been designed for his benefit does not the less entitle him to thus appeal. The power of the legislature is circumscribed by the provisions of the constitution under which it acts, and he is entitled to insist that it shall act only within the limits authorized thereby. There is nothing illegal, nothing inequitable in his so doing, nor has any authority been cited in contravention of his right to do so.

Moreover, complainant has no option in the premises. It is bound to invoke all constitutional and statutory provisions for the benefit of its stockholders. It is upon the ground of its duty to thus act that it is entitled to appeal to a Court of Equity for the protection of the trust of which it is administrator, the fund of which it is trustee, and the shareholders, the beneficiaries of the trust. To protect the trust, save it from dissipation and shield itself against a multiplicity of suits it is entitled to appeal to a Court of Equity against unlawful and unauthorized exercise of the taxing power. This right involves the correlative duty to act in the premises. It is not at liberty to waive any statutory or constitutional provision in the premises. Only upon showing that the constitution and the laws have been observed in the levy and collection of the

tax will it be entitled to exact reimbursement from the stockholder of such amount as it may pay in satisfaction of the tax. The stockholder may waive, may acquiesce; the complainant is not at liberty to do so.

Did the cases of *Supervisors* vs. *Stanley*, 105 U. S., 305, and *Palmer* vs. *McMahon*, 133 U. S., 667, authorize such a position, it is sufficient to say that that position is not in harmony with the decision of the Supreme Court of this State in *Miller* vs. *Heilbron*, 58 Cal., 133, where the Court declare (p. 140):

"*It would seem to be unnecessary to add that the restriction operates upon State legislation; and, therefore, the fact whether in a particular instance the owner of national bank stock shares owes any debts is immaterial. By the law of the State he is not permitted to deduct them if he does owe any.*"

McHenry vs. *Downer*, 116 Cal., 20, 27, 31.

Of course, the construction the Supreme Court of California places upon its Constitution and revenue laws is authoritative and controlling. This is the settled rule upon this subject. The constitutionality of the law cannot be tested by any nonfeasance or consent of the tax payer. The only criterion for determination of that question are the provisions of the Constitution itself. Nor is it true (p. 19) that: "An assessment of the shares is an assessment of the net assets of the cor-

poration." Such assessment it is that works the injurious discrimination complained of. The net assets of the corporation and an assessment of the shares of its stock are two widely different things for the reasons we have already submitted to the Court.

Corporate assets, of course, consist of the property of the corporation, that is, the property of the corporation in State corporations under the laws of this State liable to assessment. That may or may not in value equal the value of the stock of the corporation.

Nor does the *First National Bank of Wellington* vs. *Chapman*, 173 U. S., 205, give any support to this position. This case conclusively shows the propriety of the principle adopted by the Supreme Court of the United States that the Supreme Court of the State is the best and final arbiter of the correct construction of the Constitution and statutes of the State.

In resolving a question of that kind the Court is bound to consider all the provisions of the statute and all statutes in *pari materia* and all provisions of the constitution in order to arrive at their true meaning and give them a correct construction. Language will be moulded so as best to give effect to the intention of the legislature or the intention of the people in their organic law. Not only this, but in solving such question the Court will not limit itself merely to the dry language of the text, but will take into consideration

the policy of the State as embodied in its constitution and statutes. It will enlarge or restrain language occurring either in statute or constitution so as to arrive at the true intention of either the constitution or the statute as the case may be. Language that might under one condition of things mean one thing, under another condition of things may be considered to mean a different thing. Time, place, purpose, as well as text of the instrument must be borne in mind when solving such question. These considerations are not inappropriate when determining the value of the authority of the *National Bank of Wellington* vs. *Chapman*, 173, U. S. 205.

In the *People* vs. *Hibernia Bank*, 51 Cal., 243, the Supreme Court held that solvent credits were not assessable. This conclusion was deduced from an examination of the terms of the constitution itself and its policy as apparent upon the face of the instrument. The conclusion there reached is entirely at war with the conclusion reached in the *National Bank of Wellington* vs. *Chapman*. The Court there declared:

"Under the sections of the Revised Statutes which relate to the taxation of these latter class of banks (Section 2762 etc.) the shares are to be listed by the Auditor at their true value in money, *which necessarily demands the deduction of the debts of the bank, because the true value of the shares in money is necessarily re-*

duced by an amount corresponding to the amount of such debts."

Were this the correct rule, the decision of the Supreme Court in the *People* vs. *Hibernia Bank* would be erroneous. Were this the correct rule there would have been no occasion for the people of California to amend their constitution so as to authorize deduction of the amount of secured and unsecured debts. We say secured and unsecured debts for the reason that under the constitution a mortgage debt is made an independent assessable property, the amount of which is to be deducted from the assessable property of the mortgagor as well as the unsecured debt is to be deducted from the amount of the solvent credits of the tax payer. Upon the same principle the entire provisions of the revenue system of California upon this subject were entirely superflous and nugatory. Under the supposed rule the tax payer would be entitled to deduction of all his debts and liable to assessment only upon the net amount of the assessable value of his property. The Supreme Court of this State, however, held otherwise, and the people of California in view of that decision revised their organic law to conform thereto, declaring the rule to be as now ordained in that instrument and the statutes passed pursuant thereto.

Under no system of revenue with which we are acquainted is the assessor either bound or entitled to

enter into an accounting with a tax payer to ascertain not only how much property he has, but how much he owes, and deduct the one from the other in order to determine the proper amount in which to assess him.

Evidently, therefore, the *National Bank of Wellington* vs. *Chapman*, can afford no just authority for construction of the revenue system of this State nor aid in the solution of the question now before the Court.

We might point out between that case and the case at bar other important differences, but to do so would extend these remarks too much. We thus see the wisdom of the rule established by the Supreme Court of the United States declaring that decisions of the Supreme Court of the State as authority are controlling upon all questions of construction of the constitution and statutes of a state.

In this connection it may not be improper to add that the notice of the assessor addressed to the stockholders of complainant to appear and claim the benefit of such deductions as they might be entitled to, does not in the least affect the correct solution of the questions before the Court. The assessor was not authorized to give such notice, and notice when not authorized by law is purely gratuitous and nugatory. No person is bound to take notice of a notice not authorized by law.

In re Central Irrigation District, 117 Cal., 391.

These remarks equally apply to the position of counsel, that no solvent credits escape assessment under the constitution and laws of the State of California (p. 26). The position that "The stocks therefore under the California system of assessment as interpreted by her own courts stand for and represent the property of the corporation, and an assessment of the property is equivalent in law to an assessment of the stock" is incorrect.

The section of the Political Code (3608, Stats. 1881, 56,) the constitutionality of which was considered in *Burke* vs. *Badlam*, 57 Cal., 594, reads:

"Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore, all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor."

It will be observed that this statute does not declare that the actual value of the property of the corporation is the equivalent of the shares of stock of the corporation; on the contrary, all that it does say is that such shares possess no *intrinsic value* over and above the actual value of the property of the corporation. Intrinsic value and market value, intrinsic value and the

assessable value of property, (Pol. Code, Sec. 3617, Sub. 5th,) are widely different things. We have seen that the market value of stock may be par, may be above par, may be below par. The market value of the stock of the Bank of California, as agreed upon in one of these cases, was over $400 per share. This does not mean that the corporate property of the corporation is intrinsically worth that much. We all know that it means the efficient and successful handling of the corporate property of the corporation, as well as participation in enjoyment of the common prosperity of the country. Intrinsic value, therefore, is one thing; market value is another thing. The full cash value of this stock, or the amount at which the property would be taken in payment of a just debt due from a solvent debtor, might mean that the stock was worth $400 a share, whereas the intrinsic value of the corporate property of the corporation might not be fifty per cent. of the par value of the stock. The legislature, in this section, after making the declaration, lay down the rule that: "Therefore, all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor."

In *Burke* vs. *Badlam*, 57 Cal., 601, the Court held this rule constitutional, holding that "*To assess all of the corporate property of the corporation and also to assess each of the stockholders the number of shares held*

by him, would, it is manifest, be assessing the same property twice; once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders in proportion to the number of shares held by each;" but this is a widely different proposition from saying that shares of stock of the corporation equal or exceed the intrinsic value of the corporate property of the corporation. It is not an announcement that the one is the equivalent of the other. While to assess the stock in the hands of the stockholder and at the same time assess the corporate property of the corporation would undoubtedly constitute double taxation of the property, yet it is evident that this does not constitute a declaration that the one is the equivalent of the other. Hence the position of counsel is not tenable.

In the respects indicated and for the reasons already stated, we respectfully submit that the act of the legislature in question is unconstitutional and void, and that complainant is entitled to the relief prayed for in its bill.

Respectfully submitted.

T. I. Bergin,
Counsel for Complainant.

Dated Dec. 5, 1901.

No. 794.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association, *Appellant*,

vs.

WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and

JOSEPH H. SCOTT, as Tax Collector of said City and County,

Appellees.

Cleveland Trust Company vs. *Lander,* 184 U.S., 111, and remarks of counsel for appellant thereon.

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IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT,

NORTHERN DISTRICT OF CALIFORNIA.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a national banking association, *Appellant*, vs. WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and JOSEPH H. SCOTT, as Tax Collector of said City and County, *Appellees.*	No. 794.

Cleveland Trust Company vs. *Lander*, 184 U.S., 111, and remarks of counsel for appellant thereon.

This case, *Cleveland Trust Company* vs. *Lander*, 184 U. S., 111, was decided subsequently to the submission of the case at bar. It was wholly unknown to counsel for appellant at the time of the argument and submission of the case.

Upon cursory perusal it might be taken as controlling, if not decisive of the case at bar, and hence we ask permission from the Court to submit the following remarks upon it.

Every State in the Union is entitled to adopt its own revenue system. It may mould and shape the same so as to best suit the interests or convenience of its citizens. Unless such system contravene some provision of the Constitution of the United States or some act of Congress of the United States enacted in pursuance thereof, it is entitled to full force and effect. The courts of each State are the appropriate exponents of its provisions. The Federal courts will respect such system. The decisions of the respective State construing the same are there regarded as controlling and authoritative. Upon these principles and for the following reasons that case is neither controlling nor decisive of the case at bar.

1. The provisions of the Constitution of the State of California upon the subject of revenue in a most important particular differ from those of the other constitutions of the various States of the Union in providing that "all property in this State, *not exempt under the laws of the United States*, shall be taxed in proportion to its value to be ascertained as provided by law." (Sec. 1, Art. XIII, Const. of Cal. *Vide* Appellant's Points and Authorities, pages 4–8.)

The case (*Cleveland Trust Company* vs. *Lander*,

111–114) is decided upon authority of *Van Allen* vs. *Assessors*, 3 Wall., 573, upon the ground that:

"The Court asserted a distinction between the property of the bank and corporation as such, and the property of the shareholders as such, and held that the tax authorized by the statute was a tax on the shares, *the property of the shareholder*, not a tax on the capital of the bank, the property of the corporation."

The Chief Justice and Justices Wayne and Swayne dissented from the opinion of the Court in *Van Allen* vs. *Assessors*, and their views upon the point here in question are expressed in 3 Wall., 598 and following.

The views of the Chief Justice and his associates there expressed were approved and adopted by the Supreme Court of this State in *Burke* vs. *Badlam*, 57 Cal., 594, the Court remarking (page 601):

"This property is held by the corporation in trust for the stockholders, who are the beneficial owners of it in certain proportions called shares, and which are usually evidenced by certificates of stock. The share of each stockholder is undoubtedly property, *but it is an interest in the very property held by the corporation.* It is his right to a proportionate share of the dividends and other property of the corporation—nothing more. When the property of the corporation is assessed to it, and the tax thereon paid, who but the stockholders pay it? It is true that it is paid from the treasury of the corporation before the money therein is divided, but it

is substantially the same thing as if paid from the pockets of the individual stockholders. To assess all of the corporate property of the corporation, and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice—once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each."

That case was an application for a writ of mandate compelling the assessor "to assess * * * to various holders of certificates of stock in various corporations the respective shares held by them, and to assess the various depositors in various savings banks the respective sums of money deposited by them." (57 Cal., 599.)

If the interests of the stockholder in the stock of the corporations therein referred to constituted assessable property within the meaning of the revenue system of the State of California, of course the assessor would be bound to assess the same, and the Court would be equally bound to compel him to assess it. The Court, however, denied the application for the writ, thus establishing that under the revenue system of this State the interest of the stockholder in a corporation does not constitute assessable property as recognized under the constitution and laws of this State. Had such interest constituted such property, the duty of the assessor and of the Court would be equally clear, and the right to

the writ would necessarily follow. But the writ was denied, and denied upon this distinct ground. Whatever, therefore, may have been the proper construction of the provisions of the revenue system of the State of New York involved in the case of *Van Allen* vs. *Assessors*, or in any other case, the Supreme Court of this State has thus authoritatively declared that under the constitution and revenue laws of the State of California, the interest of the stockholder in a corporation does not constitute assessable property; that to assess the same, and at the same time to assess the property of the corporation, would constitute *double taxation*, not allowed under the Constitution of California. It is needless to say that this case, decided at the January term of 1881, has ever since remained the law of the State of California. This decision, therefore, demonstrates the inapplicability to the case at bar of the doctrine established in *Van Allen* vs. *Assessors*, 3 Wall., 573, upon the authority of which *Cleveland Trust Company* vs. *Lander*, 184 U.S., 111, was decided, and shows that the latter case is neither controlling nor decisive of the question involved in the case at bar.

Upon authority of the views of the Chief Justice and Justices Wayne and Swayne thus approved and ripened into judgment in *Burke* vs. *Badlam*, there can, of course, be no question of the right of the stockholder in the assessment of his stock to the benefit of all deductions arising from corporate investments of a Federal

character precisely the same as if he personally had made the investment, and not the corporation, his mere representative acting on his behalf.

We have felt constrained to thus call the attention of the Court to these views, as the question here involved is one of constitutional law not affecting merely the parties to the record, but affecting all persons who may be interested in the question of taxation involved in it. All are equally entitled to the equal protection of the law, and are only bound to bear the same proportionate share of the burden of taxation. All are equally entitled to the same rights and immunities, and hostile discrimination against one class of persons as against another class engaged in the same line of business, under whatever guise the same may assume, is unconstitutional and should meet with condemnation at the hands of the Court. (*Connolly* vs. *Union Sewer Pipe Company*, 184 U. S., 564.)

Trusting that we may be pardoned for thus trespassing upon the attention of the Court, we respectfully submit these views.

Dated September 22d, 1902.

T. I. BERGIN,
Counsel for Appellant.

No. 794

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO (a National Banking Association),

APPELLANT,

VS.

WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, et al.,

APPELLEES.

APPELLEES' BRIEF.

FRANKLIN K LANE,
City Attorney,
Solicitor for Appellees.

The Star Press—James H. Barry—S. F.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO (A NATIONAL BANKING ASSOCIATION.)

Appellant,

vs.

WASHINGTON DODGE, AS ASSESSOR OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, and JOSEPH H. SCOTT, AS TAX COLLECTOR OF SAID CITY AND COUNTY,

Appellees.

Appellees' Points and Authorities.

Between the first Mondays in March and July, 1900, the Assessor of the City and County of San Francisco proceeded to and did assess, for purposes of taxation, the shares of stock of all national banks having their principal place of business in said City and County. This assessment was made under and in virtue of the provisions of an Act of the Legislature of the State of California, in ef-

fect March 14, 1899, amending section 3608 of the Political Code of that State, and adding sections 3609 and 3610 thereto, all relating to property liable to taxation for purposes of revenue. The purpose of this act is served when an assessment and taxation of National Bank shares is secured at a rate not greater "than is made or assessed "upon other moneyed capital in the hands of individual "citizens of this State."

A review of the legislative and judicial history of the attempts of the State of California to subject the shares of stock of national banks, having their principal places of business in this State, to assessment and taxation, would be full of legal interest. Up to the passage of the Act of 1899, these attempts have been uniformly unsuccessful. It is believed that, in that Act, the State has complied with all the limitations imposed by the Congress, and has honestly and fairly provided a system through which justice will be done the banks and the banks will be required to do justice to the State and her taxpayers. It is upon the validity of this Act, tried in the crucival of Federal and State limitation, that this appeal must come to depend. And upon that test rests the right of a Sovereign State to subject to their just share of the burdens of her Government, the wealth within her limits invested in national bank stock. Congress has recognized the justice of requiring such property to bear its proper proportion of such burden, not alone that the Government of the State may be thereby sustained, but equally that no Federal agency shall

be introduced into the commercial life of a State, free from the obligations which are imposed by the necessity of sustaining that Government upon her own banks and bankers. While it is important that no national bank should be the object of unjust discrimination at the instance of the State, it is equally essential that no State bank should be so subjected.

"All that has ever been held to be necessary is, that the "system of State taxation of its own citizens, of its own "banks, and of its own corporations shall not make a dis- "crimination unfavorable to the holders of the shares of "national banks. Nor does the Act of Congress require "anything more than this; neither its language nor its "purpose can be construed to go any further. Within "these limits the manner of assessing and collecting all "taxes by the States is uncontrolled by the Act of Con- "gress."

Davenport Bank vs. *Davenport*, 123 U. S., 84.
Mercantile Bank vs. *New York*, 121 U. S., 138.

In so much as the exemption of one class of property must increase the burden to be borne by that which remains to be taxed, is it unjust to all other classes of property that any should be allowed to escape taxation. Every intendment, therefore, should be indulged in support of a law which bears upon its face evidence of a sincere desire to avoid discrimination, and to deal fairly with the national banks and their shareholders. While the right of

every citizen to resist an unjust or excessive tax must be cheerfully conceded, the practical workings of an intricate system of taxation do not admit of that nicety of adjustment which will relieve all individual hardship or produce absolute uniformity of assessment.

"The most that can be expected from wise legislation is "an approximation to the desirable end, and the require- "ment of equality and uniformity found in the Constitu- "tions of some of the States is complied with, when de- "signed and manifest departures from the rule are "avoided."

Stanley vs. *Supervisors*, 121 U. S., 550.

The determination of the questions here involved invites a high and broad minded view of the issues presented commensurate with the dignity and importance of the subjects to which they relate.

I.

Constitutionality of the Act of March 14, 1899.

We pass to a consideration of the constitutionality of the Act of March 14, 1899, wherein serious questions press for determination. What solicitor for appellant has said, in definition of the power of the State to exercise the power of taxation, may be conceded. Whether the State possesses an inherent power, as a necessary attribute of her sovereignty, to tax all property within her limits, irrespec-

tive of the uses to which it may be put, until such power is restricted or limited by express Act of Congress, is immaterial in this inquiry. Whether Section 5219 of the Revised Statutes be considered a limitation upon the taxing power of the State, or a grant to the State, of power to tax the shares of national banks, the all important fact remains that the power to tax the shares of stock of national banks was conceded to the States by Act of Congress in Section 5219 of the Revised Statutes.

By that section the power is confirmed in the State to "include in the valuation of the personal property of the "owner or holder of such shares" all shares in any national banking association; and it is expressly declared:

"But the Legislature of each State may determine and "direct the manner and place of taxing all the shares of "national banking associations located within the State, "subject only to the restrictions that the taxation shall "not be a greater rate than is assessed upon other mon-"eyed capital in the hands of individual citizens of such "States, and that the shares of any national banking as-"sociation owned by non-residents of any State shall be "taxed in the city or town where the bank is located, and "not elsewhere."

Subject to the two restrictions noted, the power of the State to tax the shares of capital stock of national banks is as great as its power to tax any other species of property found within the taxing jurisdiction, and such power is unlimited.

" Unless restrained by provisions of the Federal Consti-
" tution, the power of the State as to the mode, form and
" extent of taxation is unlimited, where the subjects to
" which it applies are within the jurisdiction."

State Tax on Foreign Held Bonds, 15 Wall., 334.
Kirtland vs. *Hotchkiss*, 100 U. S., 491.
Mackay vs. *S. F.*, 113 Cal., 392.

And the Act of Congress recognizes this rule by declaring, "that the Legislature of each State may direct and de-
" termine the manner and place of taxing all the shares of
" national banking associations located within the State."

Uniformity of Assessment.

We find, that, in consequence of this power in the State, the questions presented most frequently for determination in connection with its exercise concern the force and effect of the two restrictions imposed by Congress; and, as the requirement, that the shares of non-residents shall be taxed at the locality in which the bank is situated, is unambiguous and easily complied with, the great volume of litigation has to do with the interpretation of the first restriction: "that the taxation shall not be at a greater rate
" than is assessed upon other moneyed capital in the hands
" of individual citizens of such State."

At the outset it may be conceded that the requirement that taxation shall not be "at a greater rate" means that

the assessment, as well as the amount levied in proportion to the assessment, shall not be at a greater rate.

And by that concession we do not desire to be understood as conceding that each individual variation, between assessment of national bank shares and other taxable property, would constitute a ground for successful assault upon the assessment. Individual variations are unavoidably incident to every system of taxation, are so recognized by the Courts, and are condoned accordingly. It is only under a state of facts which discloses a preconcerted understanding on the part of the Assessor, or as a result of operations of the State statute, to discriminate against the shares of national banks, that the courts will declare an assessment void on that ground.

As the Supreme Court says, in *Stanley* vs. *Supervisors*, 121 U. S., 550:

"Absolute equality and uniformity are seldom, if ever, " attainable, the diversity of human judgments, and the " uncertainty attending the human evidence, preclude the " possibility of this attainment. Intelligent men differ as " to the value of most common things before them—of ani- " mals, houses and lands in constant use. The most that " can be expected from wise legislation is an approxima- " tion to the desirable end; and the requirement of equality " and uniformity found in the Constitutions of some of the " States is complied with, when designed and manifest de- " partures from the rule are avoided."

And it is accordingly the rule that Courts will not interfere with an assessment of property at its full value, on the ground of inequality resulting from the assessment of other property at less than its full value, unless it appears that the assessing officers, whose acts of under-valuation create the discrimination, intentionally and habitually violate the law by assessing property at less than its true value.

Bank vs. *Kimball*, 103 U. S., 722.
Supervisors vs. *Stanley*, 105 U. S., 305.
Bank vs. *Perea*, 147 U. S., 67.

"Other Moneyed Capital."

There is another settled construction upon which it may be possible to agree. The term "other moneyed capital," as used in this section, has received what may be considered a settled interpretation, in the light of which the consideration of this case should proceed.

In the very recent case of *National Bank* vs. *Mayor, etc., of Baltimore*, 100 Fed., 29, the Circuit Court of Appeals for the fourth Circuit says:

"The words 'moneyed capital' not having been defined by "the statute, it has been left to the courts to interpret "them, and they have been so frequently considered by "the Supreme Court of the United States that there is little "difficulty in ascertaining what that Court construes them "to mean. The leading case is *Mercantile Nat. Bank* vs. "*City of New York*, 121 U. S., 157, and the last case is *First*

"*National Bank of Aberdeen* vs. *Chehalis Co.*, 166 U. S., "440. In these two will be found a review of nearly all "the decisions. It would serve no good purpose to restate "them. The result of them all is that 'moneyed capital' "has been given a restricted meaning. It is the nature of "the employment that fixes its character. * * *

"The policy and purpose of Congress was to protect the "instrumentalities created by it from unfair competition, "by requiring that all persons engaged in like business "should pay upon the capital so employed a like and equal "rate of taxation. *The true test* is the nature of the busi- "ness in which the person is engaged, and that cannot be "determined by the character of the investment. Moneyed "capital does not mean all capital the value of which is "measured in terms of money."

In short, only competing "moneyed capital" is required to be assessed at no greater rate than shares of stock of national banks.

Mercantile Bank vs. *New York*, 121 U. S., 154-7.
Evansville Bank vs. *Britton*, 105 U. S., 322.
National Bank vs. *Chehalis*, 166 U. S., 440.

The questions are so far narrowed, therefore, as to be confined to the inquiry whether the revenue laws of California, as found in its Constitution and statutes, including the Act of March 14, 1899, assume to impose a greater rate

of taxation upon the shares of national banks than they impose upon other competing "moneyed capital."

We say this is the scope of the inquiry on this part of the case, for the reason that it is not alleged, nor is it a fact, that appellee has intentionally or unintentionally, discriminated against such shares, or that he has discriminated at all, other than by such discrimination as, it is alleged, will result from the revenue laws of the State. On the contrary, the appellant has deducted from the properties of the banks, which are legally elements in the estimation and determination of the value of its shares, the United States bonds held by such banks (Record, pp. 12 and 13), although it was early declared by the United States Supreme Court that it was competent to include such bonds, in the estimation of the value of the shares.

Van Allen vs. *Assessors,* 3 Wall., 573.
Bradley vs. *People,* 4 Wall., 459.
People vs. *Commissioners,* 4 Wall., 244.

Statement of the Concrete Question.

We reiterate, therefore, the question is, on this branch of the case, whether the Constitution and laws of the State of California do, on their face, discriminate against national bank shares, in their assessment and the assessment of other competitive moneyed capital.

And at the opening of this inquiry, the syllabus of the Supreme Court of the United States, in *Davenport Bank* vs. *Davenport,* 123 U. S., 83, may be quoted with profit:

"Section 5219 Revised Statutes, respecting the taxation "of national banks, does not require perfect equality be- "tween State and national banks, but only that the system "of taxation in a State shall not work a discrimination "favorable to its own citizens and corporations, and un- "favorable to the holders of shares of national banks. If "a State statute creating a system of taxation does not, on "its face, discriminate against national banks, and there "is neither evidence of legislative intent to make such dis- "crimination, nor proof that the statute works an actual "and material discrimination, there is no case for holding "it to be unconstitutional."

It will hardly be contended that this Act of 1899 discloses on its face any hostile legislative intent, so far as permitting such deductions from national bank stock as are permitted to other moneyed capital.

On the contrary, in the enactment of the Act of March 14, 1899, the Legislature of the State repeatedly emphasized its intent that no discrimination should be made against the holders of national bank shares. Thus it is provided in the Act (Sec. 3609):

"And the assessment and taxation of such shares of "stock in said national banking associations shall not be at "a greater rate than is made or assessed upon other "moneyed capital in the hands of individual citizens of "this State."

And again, in the same section, it is provided: "and said

"shares shall be valued and assessed as is other property " for taxation."

The only discrimination on the face of the statute, if that be a discrimination, is in the exemption of shares of stock of other corporations from assessment.

With this in mind we pass to a consideration of the revenue system of California, with particular reference to the validity of the Act of March 14, 1899.

The statute it attacked on several grounds, the *first*, and perhaps the most important of which, is, that no deduction can lawfully be allowed to the owners of national bank stock for unsecured debts owing by them to *bona fide* residents, while such a deduction is permitted and required to be made from solvent credits unsecured; and *second*, that no assessment of the shares of national bank stock can be made while the State law (Section 3608 Pol. Code) exempts, *co nomine*, shares of stock in certain other corporations from assessment and taxation.

We will discuss these questions in their order.

A.

Is a Deduction Allowed to the Owners of National Bank Stock from the Value of their Stock of Debts Owing by them to Bona Fide Residents of the State?

This contention, as insisted upon by appellant, involves the validity of that portion of the Act of 1899, which provides for such deduction. Section 3609, Political Code, as found in that Act, provides:

"But in the assessment of such shares, each stock-
holder shall be allowed all the deductions permitted by
"law to the holders of moneyed capital in the form of
"solvent credits, in the same manner as such deductions
"are allowed by the provisions of paragraph six of section
"thirty-six hundred and twenty-nine of the Political Code
"of the State of California. * * * And the assess-
"ment and taxation of such shares of stock in said national
"banking association shall not be at a greater rate than
"is made or assessed upon other moneyed capital in the
"hands of individual citizens of this State."

The attitude of appellant is, not that the Act has failed to make provision for the deduction which it claims, and which the Assessor alleges he is prepared to grant, but that the clause of the statute permitting such deduction is unconstitutional and void.

Section 1, Article XIII, Const. of Cal.

In the first place, the provision which is attacked as being void is obviously designed for the benefit of complainant's stockholders, and is in conformity with appellant's construction of the Act of Congress requiring that such shares shall not be assessed at a greater rate than is assessed upon other moneyed capital. The Act of the Legislature gives it such right, but it complains that it has been given it by the statute, and not by the Constitution. Can it be heard to complain because a right is accorded him of which he will be permitted to take advantage, and

which brings this portion of the statute unquestionably within the provisions of the only Act which affords him protection? What beneficial interest has complainant in avoiding a portion of a statute which was designed for its benefit?

And even if this Act of 1899 had contained no such provision, would it result therefrom that it would be void?

This question was answered by the Supreme Court of the United States in *Supervisors* vs. *Stanley*, 105 U. S., 305-311, as follows:

"Accepting, therefore, as we must, the Act of 1866, as "construed by the Court of Appeals of New York, as not "authorizing any deduction for debts by a stockholder of "a national bank, is it, for that reason, void? This cannot "be true in its full sense, for there is no reason why it "should not remain the law as to banks or banking asso- "ciations organized under the laws of the State, or as to "private bankers, of which there no doubt exists a large "number of both classes.

"What is there to render it void as to a stockholder in a "national bank, who owes no debts which he can deduct "from the assessed value of his shares? The denial of this "right does not affect him. He pays the same amount of "tax that he would if the law gave him the right of deduc- "tion. He would be in no better condition if the law ex- "pressly authorized him to make the deduction. What "legal interest has he in a question which only affects "others? Why should he invoke the protection of an Act

" of Congress in a case where he has no right to protect?
" Is a Court to sit and decide abstract questions of law in
" which the parties before it show no interest, and which, if
" decided either way, affect no right of theirs?

" It would seem that if the Act remains a valid rule of
" assessment for shares of State banks and for individual
" bankers, it should also remain the rule for shareholders
" of national banks who have no debts to deduct, and who
" could not, therefore, deduct anything if the statute con-
" formed to the requirements of the Act of Congress."

And again, in the same case, after reviewing a number of authorities, the Court says (page 315) :

" It follows that the Assessors were not without author-
" ity to assess national bank shares; that where no debts
" of the owners existed to be deducted the assessment was
" valid, and the tax paid under it a valid tax. That in
" cases where there did exist such indebtedness, which
" ought to be deducted, the assessment was *voidable* but not
" void. The assessing officers acted within their authority
" in such cases until they were notified in some proper man-
" ner that the shareholder owed just debts which he was
" entitled to have deducted."

This case has been affirmed in *Palmer* vs. *McMahon,* 133 U. S., 667.

If, therefore, appellant can be heard to complain of a provision in the law favorable to its shareholders, and of

which the appellee alleges his intention of giving it the full benefit, and its contention that this beneficial provision of the statute is void in so far as it denies such deduction, where the shareholders are entitled to it, is sustained, it by no means follows that the Assessor is without power to make such assessment, or that the assessment, when made, would be anything more than voidable; on the contrary, it would not be either void or voidable until a showing was made and sustained that the shareholders were indebted, in unsecured debts, to *bona fide* residents of the State.

Such an assessment, made in the presence of a showing that the stockholder was so indebted, and had complied with the provisions of the law entitling him to such deduction, would disclose a voidable assessment as to such stockholder. But, as to all other stockholders who fail to avail themselves of the deduction, the assessment would be perfectly good.

But that would indeed be a peculiar principle, which would permit a complainant to enter a Court of equity for the purpose of claiming the protection of the Act of Congress, and under cover of such pretense to permit it to attack the features of a State law designed for its benefit, and in conformity with that Act.

The right, however, to enjoy that deduction from solvent credits of debts due to *bona fide* residents is not without its conditions. The Constitution of California has not conferred that right, but has simply provided:

"The Legislature *may* provide, except in the case of

"credits secured by mortgage or trust deed, for a deduc-
"tion from credits of debts due to *bona fide* residents of
"this State."

Section 1, Article XIII, California Constitution.

This section is not self-executing, and it remained for the Legislature to make provision for such a reduction before it was available to the taxpayer. This provision was made in virtue of the provisions of Section 3629, Subdivision 6, of the Political Code. In defining what property shall be separately stated in the statement of the taxpayer, it is provided therein, with respect to solvent credits:

"6. All solvent credits, unsecured by deed of trust,
"mortgage, or other lien on real or personal property, due
"or owing by such person, or any firm of which he is a
"member, or due or owing to any corporation of which he
"is president, secretary, cashier, or managing agent, de-
"ducting from the sum total of such credits such debts
"only, unsecured by trust deed, mortgage, or other lien on
"real or personal property, as may be owing by such per-
"son, firm or corporation, to *bona fide* residents of this
"State. *No debt shall be deducted unless the statement*
"*shows the amount of such debt as stated under oath in*
"*aggregate; provided, in case of banks the statement is not*
"*required to show the debt in detail, or to whom it is*
"*owing;* but the Assessor shall have the privilege of ex-
"amining the books of such banks to verify said state-
"ment."

Appellant would be entitled to a deduction, on account of debts due *bona fide* residents of California, from the value of its stock in any event, *only* after the condition here expressed in the statute granting such right to all taxpayers had been complied with. No debt shall be so deducted unless the bank shall return, in its statement of property, the amount of debts due to such *bona fide* residents. Such debts need not be stated in detail, but a statement of the amount for the deduction of which the claim is asserted, must be made.

There is no showing here that any such statement has been made; that any such deduction has been demanded, or that any such indebtedness exists. On the contrary, appellees allege (Record, pp. 40, 41, 42) that no such statement was made or returned in accordance with Section 3629 of the Political Code, or otherwise.

This brings appellant's case clearly within the rule laid down by the Supreme Court that, where a condition is imposed on the enjoyment of a right, such condition must be complied with before the right can be enforced.

Conceding, however, for the present, that that portion of the Act of March 14, 1899, which provides for the deduction from national bank stock of unsecured debts due *bona fide* residents, is in conflict with Section 1, Article XIII, of the Constitution of the State, it by no means follows that the act is not enforceable; or that an assessment made in conformity with its remaining provisions would discriminate against the owners of national bank shares; or that such

shares would be assessed at a greater rate than is or will be assessed upon the moneyed capital in competition therewith.

B.

An Assessment of the Shares is an Assessment of the Net Assets of the Corporation.

If, in the assessment of shares of stock, the value of such shares represents the difference between the gross assets of the bank and its liabilities, other than secured credits, it follows that such an assessment is the equivalent of an assessment of the assets of the banks minus its unsecured liabilities. If this be so, the method of assessment, required by Act of Congress, has been followed, by an assessment of the shares of stock without permitting a deductiion from such shares of unsecured debts. To allow such deduction to the shareholder would be to allow a double deduction from such credits—once for the unsecured debts of the bank, and second for the unsecured debts of the shareholders. This is manifestly not required by the Act of Congress, the requirements of which are met when an equal deduction is made, and which does not require that there should be any discrimination *in favor* of national bank shares.

A contention almost identical with the one now under discussion reached the Supreme Court of the United States in *National Bank of Wellington* vs. *Chapman*, 173 U. S., 211, a case in which the revenue laws of Ohio allowed a de-

duction of debts from credits, but denied it to the holders of shares of stock. The position is stated thus in the opinion:

"The complaint is founded upon the allegation that the "owners of what is termed credits in the law of Ohio "(Rev. Stats., par. 2730) are permitted to deduct certain "kinds of their debts from the total amount of their "credits, and such owners are assessed upon the balance "only, while no such right is given to owners of shares in "national banks. The claim is that shares in national "banks should be treated the same as credits, and their "owners permitted to deduct their debts from the valua- "tion. The owners of property other than credits are not "permitted to deduct their debts from the valuation of "that property" (p. 213).

This would appear to be a case almost identical in fact and principle with the case at bar.

The Court said (p. 215):

"Under the Ohio law the shares in national and also in "State banks are what is termed stocks or investments in "stocks, and are not credits from which debts can be de- "ducted. As between the holders of shares in incorpor- "ated State banks and national banks on the one hand, and "unincorporated banks or bankers on the other, we find "no evidence of discrimination in favor of unincorporated "banks or bankers. In regard to this latter class, there is

"no capital stock, so-called, and Section 2759 of the Re-
"vised Statutes therefore makes provision, in order to de-
"termine the amount to be assessed for taxation, for de-
"ducting the debts existing in the business itself from the
"amount of moneyed capital belonging to the bank or
"banker and employed in the business, and the remainder
"is entered on the tax book in the name of the bank or
"banker, and taxes assessed thereon. This does not
"give the unincorporated bank or banker the right to de-
"duct his general debts disconnected from the business of
"banking, and not incurred therein, from the remainder
"above mentioned. It cannot be doubted that under this
"section those debts which are disconnected from the bank-
"ing business cannot be deducted from the aggregate
"amount of the capital employed therein. The debts that
"are incurred in the actual conduct of the business are de-
"ducted so that the real value of the capital that is em-
"ployed may be determined and the taxes assessed thereon.

"This system is, as nearly as may be, equivalent in its
"results to that employed in the case of incorporated State
"banks. Under the sections of the Revised Statutes which
"relate to the taxation of these latter classes of banks
"(Sec. 2762, etc.), the shares are to be listed by the auditor
"at their true value in money, *which necessarily demands*
"*the deduction of the debts of the bank, because the true*
"*value of the shares in money is necessarily reduced by an*
"*amount corresponding to the amount of such debts.* In
"order to arrive at their true value in money the bank re-

"turns to the auditor the amount of its liabilities as well "as its resources. Thus in both incorporated or unincor- "porated banks the same thing is desired, and the same re- "sult of assessing the value of the capital employed in the "business, after the deduction of debts incurred in its con- "duct, is arrived at in each case as nearly as is possible, "considering the difference in manner in which the "moneyed capital is represented in unincorporated banks "as compared with incorporated banks which have a capi- "tal stock divided into shares. That mathematical equal- "ity is not arrived at in the process is immaterial. It can "not be reached in any system of taxation, and it is use- "less and idle to atempt it. Equality, as far as the differ- "ing facts will permit, and as near as they will permit, is "all that can be aimed at or reached. That measure of "equality, we think, is reched under this system. So far "as this point is concerned, it is entirely plain that there "is no discrimination between unincorporated banks and "bankers on the one hand and the holders of shares of "stock in national banks on the other."

In this connection, we quote from *Bressler* vs. *Wayne Co.*, 32 Neb., 834.

This case involved the right of a holder of national bank shares to deduct his *bona fide* debts in listing his shares for taxation.

In the opinion the leading cases of the United States Supreme Court, on the questions of deductions and exemp-

tions, are considered and the former doctrine of the State Court overruled.

"The fact that the unincorporated bank is entitled to "such deduction is no valid reason why the debts of the "owner of national bank stock should be deducted from "the value of his shares in assessing them. National "banks are assessed solely by taxing the shares of stock. "In unincorporated banks there are no shares of stock to "tax, and the Legislature, of necessity, was compelled to "adopt a different method of taxing them by assessing the "value of the capital therein invested, which is practical- "ly the difference between the value of the assets and the "amount of liabilities. *The shares of a national bank do "not represent the assets of the bank, but rather the differ- "ence between the value of its property and its liabilities.* "While the method of assessing national banks is different "from that by which a private bank or banker is assessed, "the rule of uniformity is preserved, so that it cannot be "said that the law of the State requires that national banks "shall be taxed at a greater rate than is imposed upon "the capital invested in the State banks."

In *Chapman* vs. *Bank of Wellington*, 56 Ohio, 310, affirmed in *National Bank of Wellington* vs. *Chapman*, 173 U. S., 205, the Court, in considering Section 2762, Revised Statutes of Ohio, providing that shares of stockholders in incorporated banks, whether State or national, shall be "listed at their true value in money" (p. 328), holds that,

in fixing the true value of the shares in money, the bank deducts its debts from its credits, so that it pays taxes only on its net valuation. Unincorporated banks are taxed in the same manner by deducting debts from credits, so as to pay only on the net capital stock. By Section 2759 of the laws of Ohio, in the case of incorporated State banks, after the deduction of debts from credits is made, and the net value of each share of stock thus ascertained, the holder of such stock is compelled to pay taxes upon such value, and is not permitted to deduct his legal *bona fide* debts therefrom. In the case of the unincorporated banks, when the net value of the capital is ascertained, the bank pays the tax thereon, and the several owners of the capital are not allowed to deduct any of their individual debts from their shares of such capital. It is thus clear that moneyed capital invested in national banks is placed upon an exact equality with moneyed capital invested in State banks, and this is all that can be reasonably asked for national banks.

"To place the holder of national bank shares into the "class of bankers, and treat his shares as stocks until the "net value is fixed, and then change his stock into credits "and take him out of the class of bankers and place him "into the class of private individuals, so as to enable him "still further to reduce his stock thus changed into a "credit, by deducting therefrom his legal *bona fide* debts, "would be discriminating in favor of such national bank "shareholder, and would be giving him two chances to es-

"cape taxation while other bankers and private individ-
"uals have but one.

"We think that national bank shares belong to the class
"known as stocks, and not to the class known as credits,
"and that such shares cannot have the double advantage
"of both stock and credits; and that the holders of such
"shares have no right under the statutes, State, and na-
"tional, to deduct their legal *bona fide* debts from the as-
"sessment value of such shares."

And in *Van Allen* vs. *Assessor*, 3 Wall., *supra*, where it is held that national bank shares are taxable in the hands of the owner, regardless of the fact that part or whole of the capital of the bank is exempt from taxation, the Court, in considering the relation of the shares of stock to the property possessed by the bank, says:

"The corporation is the legal owner of all the property
"of the bank, real and personal; and within the powers
"conferred upon it by charter and for the purposes for
"which it is created, can deal with the corporate property
"as absolutely as a private individual can deal with his
"own. * * * The interest of the shareholder entitles
"him to participate in the net profits earned by the bank in
"the employment of its capital, during the existence of its
"charter, in proportion to the number of his shares; and
"upon its dissolution or termination, to his proportion of
"the property that may remain after the payment of its
"debts."

in fixing the true value of the shares in money, the bank deducts its debts from its credits, so that it pays taxes only on its net valuation. Unincorporated banks are taxed in the same manner by deducting debts from credits, so as to pay only on the net capital stock. By Section 2759 of the laws of Ohio, in the case of incorporated State banks, after the deduction of debts from credits is made, and the net value of each share of stock thus ascertained, the holder of such stock is compelled to pay taxes upon such value, and is not permitted to deduct his legal *bona fide* debts therefrom. In the case of the unincorporated banks, when the net value of the capital is ascertained, the bank pays the tax thereon, and the several owners of the capital are not allowed to deduct any of their individual debts from their shares of such capital. It is thus clear that moneyed capital invested in national banks is placed upon an exact equality with moneyed capital invested in State banks, and this is all that can be reasonably asked for national banks.

"To place the holder of national bank shares into the "class of bankers, and treat his shares as stocks until the "net value is fixed, and then change his stock into credits "and take him out of the class of bankers and place him "into the class of private individuals, so as to enable him "still further to reduce his stock thus changed into a "credit, by deducting therefrom his legal *bona fide* debts, "would be discriminating in favor of such national bank "shareholder, and would be giving him two chances to es-

"cape taxation while other bankers and private individ-
"uals have but one.

"We think that national bank shares belong to the class
"known as stocks, and not to the class known as credits,
"and that such shares cannot have the double advantage
"of both stock and credits; and that the holders of such
"shares have no right under the statutes, State, and na-
"tional, to deduct their legal *bona fide* debts from the as-
"sessment value of such shares."

And in *Van Allen* vs. *Assessor*, 3 Wall., *supra*, where it is held that national bank shares are taxable in the hands of the owner, regardless of the fact that part or whole of the capital of the bank is exempt from taxation, the Court, in considering the relation of the shares of stock to the property possessed by the bank, says:

"The corporation is the legal owner of all the property
"of the bank, real and personal; and within the powers
"conferred upon it by charter and for the purposes for
"which it is created, can deal with the corporate property
"as absolutely as a private individual can deal with his
"own. * * * The interest of the shareholder entitles
"him to participate in the net profits earned by the bank in
"the employment of its capital, during the existence of its
"charter, in proportion to the number of his shares; and
"upon its dissolution or termination, to his proportion of
"the property that may remain after the payment of its
"debts."

The general rule is that a share of stock is a right to a proportionate part in the dividends and profits of the corporation and to a share of its net assets upon dissolution. That the shareholder is entitled to a part only of the net assets, or assets remaining after the payment of debts, is supported by these cases:

Plumpton vs. *Bigelow*, 93 N. Y., 599.
Field vs. *Pierce*, 102 Mass., 261.
Jones vs. *Davis*, 35 Ohio, 477.
Tax Collector vs. *Insurance Co.*, 42 La. An., 1172.
Farrington vs. *Tennessee*, 95 U. S., 687.
People vs. *Bank of D. O. Mills*, 123 Cal., 60.

C.

No Solvent Credits Escape Assessment Under the Constitution and Laws of the State of California.

It is the declaration of Section 1, Article XIII, of the Constitution of this State that:

"All property in the State not exempt under the laws of "the United States shall be taxed in proportion to its value "to be ascertained as provided by law. The word 'prop- "erty,' as used in this article and section, is hereby de- "clared to include moneys, *credits*, *stocks*, dues, *franchises*, "and all other matters and things, real, personal and "mixed, capable of private ownership.* * * The "Legislature may provide, except in case of credits secured

"by mortgage or trust deed, for a deduction from credits "of debts due to *bona fide* residents of this State."

Sec. 3607, Pol. Code.

And Section 3617, Political Code, defines credits as follows:

"The term 'credits' means those solvent debts not se- "cured by mortgage or trust deed, owing to the person, "firm, corporation, or association *assessed*. The term "'debts' means those unsecured liabilities owing by the "person, firm, corporation or association *assessed to bona "fide residents of this State*, or firms, associations, or cor- "porations doing business therein; but credits, claims, "debts and demands due, owing or accruing for or on ac- "count of money deposited with savings and loan corpora- "tions shall, for the purpose of taxation be deemed and "treated as an interest in the property of such corpora- "tions, and shall not be assessed to the creditor or owner "thereof."

It is to be noted, therefore, that the permission to deduct unsecured debts from solvent credits unsecured does not relieve any portion of the wealth of the State from taxation, but simply contemplates the assessment and taxation of such debts so deducted in the hands of and as so much property belonging to the creditor. *All credits are assessed.*

This plan of taxation finds its basis in the opinion of the

Supreme Court of the United States in State Tax on Foreign Held Bonds, 15 Wall., 324, where it is said:

"But debts owing by corporations, like debts owing by "individuals, are not property of the debtors in any sense; "they are obligations of the debtors, and only possess value "in the hands of creditors. With them they are property, "and in their hands they may be taxed. To call debts "property of the debtors is simply to misuse terms. All "the property there can be in the nature of things in debts "of corporations belongs to the creditors to whom they are "payable, and follow their domicile, wherever they may "be.'"

And it is to be further noted that not all unsecured debts are deductible from the solvent credits, unsecured, of the debtor. *Only such unsecured debts can be deducted as are owing to bona fide residents of the State.* Such debts owing abroad are not deductible, because they are not subject to the taxing jurisdiction of California in the hands of the creditor.

The Supreme Court of the State, in *People* vs. *Hibernia Bank*, 51 Cal., 247, adopted an interpretation of the taxing system of the State, in which it was held that the taxation of credits and of the other property of the State must result in double taxation. The Court says:

"It may not be possible in every case to show that the "debtor has paid the tax assessed to the creditor. But it "admits of mathematical demonstration—if other prop-

"erty in the State has been assessed at its value—that the "money which shall ultimately satisfy the debt (if it is "ever satisfied) has paid the tax. If it were possible to as- "sess all the property in the State at the same moment of "time, it would be clear to every mind that an assessment "of a credit was an attempt to transfer to it value else- "where assessed. * * * But if the debtor is found to "be the owner of one thousand dollars, and is assessed for "that sum, and his creditor is found to be the owner of his "note for one thousand dollars, and is assessed for a like "sum; and if, the day after the visit of the Asessor to the "creditor, the debtor shall pay his note, it is clear that the "same value has been twice taxed," etc.

For the purpose of conforming the revenue system of the State to the reasoning of this decision, a constitutional convention was called in which provision was made for the assessment of credits, after the deduction from their value of the liabilities assessable to the creditors.

It follows, therefore, that no moneyed capital in the form of credits escapes taxation under the tax laws of this State.

The debts, though deducted, are assessed to the creditors —in whose hands only are they property, and as such taxable.

While, therefore, a deduction is so allowed, it is a deduction of such unsecured debts only as are assessable or assessed to *bona fide* residents of the State.

Those liabilities which are debts of the debtor are also

credits of the creditor, and it is the contemplation and purpose of the law that such liabilities shall be assessed and taxed in the hands of owners thereof.

Under our theory of taxation, as considered and defined in *People* vs. *Hibernia Bank*, 51 Cal., 243, and accepted by constitutional amendment, the debtor pays the tax. If this doctrine is sound, it follows that, while such deduction is permitted, the tax nevertheless falls upon the debtor.

The conclusion on this branch of the question must be that the holders of national bank stock are not entitled to deduction from the valuation of their stock of unsecured debts due to *bona fide* residents.

D.

Does the Exemption of Shares of State Banks Discriminate Against National Banks?

It is the further contention of appellant that the Act of March 14, 1899, imposes a greater rate of taxation upon the shares of national banks than is imposed upon other moneyed capital, in this: that the shares of stock in corporations organized and existing under the laws of the State, and having their corporate property therein, are exempt from taxation *co nomine*.

Before entering upon a full discussion of this contention it may not be *mal apropos* to revert to the rule of law governing the interpretation of State statutes, under which the Federal Courts are held to the interpretation placed upon such statutes by the State Court. No citation of au-

thorities is necessary to support the rule, which is also cited and relied upon by appellant.

As hereinbefore quoted, Section 1, Article XIII, of the Constitution, requires the taxation of *all* property in the State, and defines the term "property" to include "stocks."

The question was early called to the attention of the State Supreme Court, whether, under this section, it was possible to tax the entire corporate property of the corporation, and also its shares of stock, at their actual value, without violating the provision against *double* taxation. It was insisted that to tax the entire corporate property and also the shares, would be double taxation. This question was passed upon in *Burke* vs. *Badlam*, 57 Cal., 601, where the Court, in an opinion by Mr. Justice Ross, says:

"To assess all of the corporate property of the corporation and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice, once in the aggregate to the corporation, the trustees of all the stockholders, and again separately to the individual stockholders in proportion to the number of shares held by each."

The theory upon which this holding is based, is that the assessment of the stock of a corporation to the stockholders and the asssesment of the property of the corporation to the corporation, would be an assessment of the same property twice; that the stock has no intrinsic value, over and above the value of the property of the corporation

which it stands for and represents. As we have seen already, the assessment of the stock of a corporation, at its actual value, is simply the assessment of the net assets of the corporation. The stocks, therefore, under the California system of assessment, as interpreted by her own Courts, stand for and represent the property of the corporation; and an assessment of the property is equivalent, in law, to an assessment of the stock. This view is well illustrated by the subsequent holding in *San Francisco* vs. *Fry,* 63 Cal., 470, to the effect that, where the property of a corporation was situated without the State, and could not be assessed by the State, that double taxation was not possible, and *the stock should be assessed.*

Stanford vs. *San Francisco,* 131 Cal., 34.

The decision in *Burke* vs. *Badlam, supra,* was accepted by the Legislature as a correct exposition of the laws of the State, and the principle therein established was incorporated in the laws of the State, Sec. 3608, Political Code, as follows:

"Sec. 3608. Shares of stock in corporations possess no "intrinsic value over and above the actual value of the "property of the incorporation which they stand for and "represent; and the assessment and taxation of such "shares, and also the corporate property, would be double "taxation. Therefore, all property belonging to corpora- "tions shall be assessed and taxed. But no assessment "shall be made of shares of stock in any corporation, save

"and except in national banking associations, whose prop-
"erty other than real estate is exempt from assessment by
"federal statutes."

S. V. W. W. vs. *Schottler*, 62 Cal., 115.
San Francisco vs. *Anderson*, 103 Cal., 69.
Germania Trust Co. vs. *San Francisco*, 128 Cal., 589.

That the rule so announced by the Supreme Court of California, and accepted by her Legislature, is sound, under her system of taxation, can hardly be open to question. We are aware there are numerous decisions rendered in the interpretation of other tax laws, holding that a share of stock is separate and distinct property which may be so treated for purposes of taxation, and which is not taxed in the taxation of corporate property. But the question here is not what rule would be adopted by another Court were the same questions submitted to it. The question is, what construction has been placed upon her revenue laws by the Courts of California? Is it possible, under her tax laws, so interpreted and enforced, to avoid a discrimination against national bank shareholders, by an assessment of the stock of such banks and an assessment of the property of competing corporations?

Under the California system, all the property of California corporations is assessed, including their franchises. It is frequently the case that the market value of the stock of a corporation is greatly in excess of the value of its prop-

erty, other than its franchise. This fact was called to the attention of the State Court, which recognezed the force of this suggestion, and held the Constitution and laws of the State require the assessment and taxation of the franchise of the corporation, and that its value, for purpose of such assessment and taxation, was properly ascertained by deducting from the market value of its stock the value of its corporate property, and assessing the remainder as franchise.

Thus: Let us assume the Bank of California possesses $5,000,000 worth of assessable property other than franchise. Its stock has an aggregate market value of $6,000,000. The assessable value of its franchise is properly ascertained by deducting $5,000,000, the value of its assessable property, other than franchise, from the value of its stock, $6,000,000, and assessing the balance, $1,000,000, as the value of its franschise.

San Jose Gas Co. vs. *January,* 57 Cal., 614.
S. V. W. W. vs. *Schottler,* 62 Cal., 100-112.
Ottawa Glass Co. vs. *McCalet,* 81 Ill., 556.
Burke vs. *Badlam,* 57 Cal., 594.

Under the California system of taxation of corporations, therefore, the full market value of the stock of such corporations is assessed, by an assessment of their entire property, including their franchise. Where such property is situated in another State, and is not subject to the taxing

jurisdiction of the State, the same end is attained by an assessment of the stock.

S. F. vs. *Fry*, 63 Cal., 470.

Two Lines of Decisions.

There is a further distinction which should be noted in a discussion of this question, and it has reference to the two general classes of legislation through which the different States have attempted the taxation of the property of national banks. It has been the mistaken policy of some States to place the burden directly upon the tangible property of the bank, and, in other States, the tax has been very properly assessed upon the shares of stock, with the property of the bank as the basis of valuation. This diversity has given rise to two lines of decisions in the Supreme Court of the United States, one of which has its culmination in *Owensboro National Bank* vs. *Owensboro*, 173 U. S., 664, and the other is represented by *Palmer* vs. *McMahon*, 133 U. S., 660; *Bank of Redemption* vs. *Boston*, 125 U. S., 60; *Davenport National Bank* vs. *Davenport*, 123 U. S., 83, and *Mercantile Bank* vs. *New York*, 121 U. S., 138. The *Owensboro* case drew into question the validity of a statute of Kentucky which imposed a *direct* tax upon the corporate property and franchise of the national bank, without regard to the shares of stock issued by it. The tax was upon the property and not upon the shares of stock. The tax was resisted upon two principal grounds: 1. That the taxes complained of were unlawful, because they were not laid

on the shares of stock in the names of the shareholders, but were actually imposed upon the property of the bank, contrary to the Act of Congress; 2. That if the taxes were not on the property of the bank, then they were imposed on its franchise or right to do business, derived from the laws of the United States.

The Act of Congress confers power upon the States, not to tax the property or franchise of a national bank, but only to tax the shares of such banks in the hands of the shareholders. Whether there is an equivalency between the taxation of the properties of a national bank and the taxation of its stock, is a question of valuation only, since it is not pretended that the assessment of the shares is in fact the assessment of the bank property. But in ascertaining the *valuation* at which the stock shall be assessed the net assets of the bank may be determined to the end that the actual value of the stock may be ascertained. That the value of the stock is dependent upon the assets of the bank, is admitted by the Act of Congress in providing for a deduction from the value of the shares, of the value of the real estate of the bank.

The *Owensboro* case was decided in this conclusion:

"The proposition then comes to this: Nothing but the "shares of stock in the hands of the shareholders of a na- "tional bank can be taxed, except the real estate of the "bank. The taxes which are here resisted are not taxes "levied upon the shares of stock in the names of the stock-

" holders, but are taxes levied on the franchise or intangi-
" ble property of the corporation. Thus, bringing the two
" conclusions together, there would seem to be no escape
"in reason from the proposition that the taxing law of the
" State of Kentucky is beyond the power conferred by the
" Act of Congress, and is therefore void for repugnancy to
" such Act."

The Act of 1899 is open to no such criticism. It follows the requirement of the Act of Congress and imposes the tax, not upon the franchise or intangible property of the bank, but upon the shares of the bank in the hands of its shareholders.

This may be considered the vital point of attack upon the law. And in the decision of this question we are concerned most with an attempt to make the position which we occupy thoroughly understood by the Court.

As has been asserted the question is *not* whether an assessment of the property of a national bank is the equivalent, in fact and law, of the assessment of the shares of stock of such bank in the hands of its shareholders. The Supreme Court of the United States, in the *Owensboro* and kindred cases, has held that it is not equivalent. So, also, has the Supreme Court of California held, in *First National Bank* vs. *San Francisco*, 129 Cal., 94, and like cases. The Act of 1899 does not assume to tax the property of national banks upon the theory that such a tax would be the equivalent of a tax upon their shares. This Act does not place a tax upon such property at all, but it does place a tax upon

the shares of stock of such banks. So that we are not here concerned with the question considered in the *Owensboro* case. We are not called upon to maintain the proposition that a tax upon the possessions of a national bank is the same as a tax upon its shares. We impose no such tax. Our tax is levied upon the shares of stock. Let this be understood.

But California does not levy a direct tax upon the shares of stock of California corporations, the property of which is assessed and taxed in California. It is on this fact that the attack is based. Not that we do not tax the shares of stock of national banks directly, but that we tax the shares of stock of California corporations indirectly. If the shares of stock of local corporations escape taxation under the California system, it may not be doubted that no tax can lawfully be levied upon shares of stock of national banks. So that the real question here is: Are the shares of stock of competing California corporations taxed under the California system?

The real question therefore is whether, under the California system, the assessment and taxation of all the property of California corporations is equivalent to the assessment and taxation of the shares of stock of California corporations. Not whether the assessment and taxation of the property of a national bank is equivalent to the assessment and taxation of its shares. Not whether the assessment and taxation of the property of a California corporation is equivalent to the assessment and taxation of the shares of

stock of a national bank. But whether the assessment and taxation of all the property of a California corporation is the equivalent of the taxation of the shares of stock of such corporation.

In short, whether the statement contained in Section 3608, that shares of stock possess no intrinsic value over and above the actual value of the property which they stand for and represent, and that the assessment and taxation of such shares, and also of the corporate property, would be double taxation, are legal lies; or whether those declarations and the holdings of the State Supreme Court in support thereof, are true under the revenue laws of California.

It certainly cannot be successfully contended that California must subject the corporate property within her taxing jurisdicton to double taxation in order to tax national bank stock but once. The question, then, is whether California has provided for a tax upon the shares of stock of her corporations; and this brings us to the question whether, *under her system as interpreted by her Courts*, the assessment and taxation of all the corporate property is equivalent to the assessment and taxation of the shares of stock of such corporations. And, as an interpretation of the revenue laws of a State by its own Courts, is binding upon a Federal Court, we are concerned here only with the views of the Supreme Court of California upon this point. It may be said, however, that the Supreme Court of that

State is not alone in the views expressed, very eminent authority is sister States having taken the same view.

Rice vs. *National Bank,* 23 Minn., 280.
Com'ers vs. *National Bank,* 48 Md., 117.
Lackawanna vs. *National Bank,* 94 Pa. St., 221.
Rosenberg vs. *Texas,* 67 Texas, 578.
Gordon vs. *Mayor, etc.,* 5 Till., 231.
Blythe vs *Brannin,* 3 Zabr., 484.
Johnson vs. *Commonwealth,* 7 Dana., 342.
Tax Cases, 12 G. & Johns., 117.
Smith vs. *Burley,* 9 N. H., 423.
Williams vs. *Weaver,* 75 N. Y., 31.
New Haven vs. *Bank,* 31 Conn., 106.

And there is authority of equal respectability holding to the contrary. But we are here concerned only with the views which the Supreme Court of California has taken on this question. For this is a question, we repeat, whether, under her revenue system, the assessment of all corporate property is equivalent to the assessment of the shares of the corporation. And in passing upon that question the Supreme Court of that State has held, in so many terms, that such equivalency exists—that it exists to such an extent as to leave an assessment of both the corporate property and the shares open to the objection that the same property is thereby taxed twice.

Burke vs. *Badlam,* 57 Cal., 601.
San Francisco vs. *Anderson,* 103 Cal., 70-71.

Germania Trust Co. vs. *San Francisco,* 128 Cal., 595.
People vs. *National Bank*, 123 Cal., 53-60.
S. V. W. W. vs. *Schottler,* 62 Cal., 69.
San Francisco vs. *Fry*, 63 Cal., 470.

It is not necessary here to restate the holding of those cases. They are without conflict upon the principle that the assessment of the corporate property and also the stock of the corporation would be the taxation of the same property twice, since the taxation of the corporate property is the equivalent, in fact and in law, of the taxation of the stock. Judge Sawyer, in *San Francisco* vs. *Mackay,* 21 Fed., 539-40; 10 Saw., 302, stated the conclusion thus:

"The Supreme Court of the State, in *Burke* vs. *Badlam*, "57 Cal., 594, held that the Constitution of the State does "not authorize or require, but, on the contrary, forbids, a "double taxation of property; that it would be double tax- "ation to tax all the property of a corporation to the cor- "poration, and then assess to each stockholder the shares "of stock in it held by him. This decision by the State Su- "preme Court, giving a construction to the State Consti- "tution, is controlling in this Court. The corporation is "the immediate primary owner of all the property of the "corporation, the right of the stockholders in it being only "derivative and secondary. The Constitution and laws re- "quire all property to be assessed and taxed to the owner, "and the legal presumption is, as held in the case cited, "nothing to the contrary appearing, that all property of a

" corporation has been assessed to the corporation. * * *
" That being so, the assessment of the stock in question to
" defendant is, as to the amount assessed, a second or dou-
" ble assessment of the same property, and, as such, void."

Nor do we believe that the case of *Miller* vs. *Heilbron,* 58 Cal., 133, can be successfully relied upon as overruling the authority of *Burke* vs. *Badlam, supra.* As the Supreme Court of California has said, in *McHenry* vs. *Downer,* 116 Cal., 28 the case of *Miller* vs. *Heilbron,* although decided a month or two after the decision in *Burke* vs. *Badlam,* arose on a state of facts and under a statute in existence prior to those considered in *Burke* vs. *Badlam.* In fact, the Act, in the interpretation of which *Miller* vs. *Heilbron* was rendered, was repealed at the same time the Act considered in *Burke* vs. *Badlam* was enacted (Stats. 1881, p. 56.)

Miller vs. *Heilbron is not, therefore, on this point, an interpretation of any statute now in existence in this State, or under the authority of which either competing moneyed capital or national bank stock is being assessed.* It is the attempted interpretation of a statute which was repealed twenty years ago. *Burke* vs. *Badlam,* on the contrary, is the interpretation of a statute which was then, has ever since been, and is now, a substantive law of this State.

Miller vs. *Heilbron* throws no light on any existing law of this State, and cannot be said to be in conflict with *Burke* vs. *Badlam,* which contains an exposition of existing and different laws.

In addition thereto, *Burke* vs. *Badlam* is the expressed

views of Justices Ross, Sharpstein, McKee, Thornton, McKinistry, and Myrick, with Morrison, C. J., concurring on a different point, while *Miller* vs. *Heilbron*, if in point at all upon this question, is the views only of McKinstry, Thornton and Sharpstein. The views of these Justices in Banc are not controlling, and the judgment must have failed of affirmance had not Justice Ross concurred therein upon another point mentioned in the opinion of Justice McKinstry. Mr. Justice Ross did not concur in the views expressed by Justice McKinstry so far as there was any possible conflict between those views and those expressed in *Burke* vs. *Badlam*.

The rule announced in *Burke* vs. *Badlam* must, therefore, be considered the rule of assessment in this State, of the property and shares of stock of California corporations.

It follows that there is an equivalency, under our revenue system, between the assessment of the corporate property and the assessment of the stock; that the taxation of the corporate property is the taxation of the stock, and that the taxation of both the corporate property and the stock would be the taxation of the same property twice, and double taxation.

The taxation of all the corporate property being equivalent—the same as—the taxation of all the shares of stock, no stock of California corporations escapes taxation. The contention that there is a discrimination against national banks because the shares of stock of State banks is not

taxed is, therefore, based upon a falsehood in law and in fact.

It is the holding in the *Owensboro* case that the taxation of the property of a national bank, including its franchise, is not the same as the taxation of the shares of stock of such banks. It is the holding that the Act of Congress allows the latter and forbids the former. It is the holding that the law of Kentucky, assuming to place a tax upon the property of the bank, and not upon its shares, is void for that reason. But it was not held therein, nor could it have been, that the taxation of all the property of a State bank may not be the same as the taxation of the stock of such bank.

In the language of Mr. Justice Miller, speaking for the Court in *Davenport Bank* vs. *Davenport,* 123 U. S., 85:

"It has never been held by this Court that the States "should abandon systems of taxation of their own banks, "or of money in the hands of other corporations, which "they may think the most wise and efficient modes of tax- "ing their own corporate organizations, in order to make "that taxation conform to the system of taxing the nation- "al banks upon these shares of their stock in the hands of "their owners. All that has ever been held to be necessary "is, that the system of State taxation of its own citizens, "of its own banks, and of its own corporations, shall not "work a discrimination unfavorable to the holders of the "shares of the national banks. Nor does the Act of Con- "gress require anything more than this; neither its lan- "guage nor its purpose can be construed to go any farther.

" Within these limits, the manner of assessing and collect-
" ing all taxes by the States is uncontrolled by Act of Con-
" gress."

Davenport Bank vs. *Davenport,* 123 U. S., 85, is a case in which the contention was advanced that a valid assessment of national bank stock is possible only when a similar assessment is made of State bank stock. Justice Miller states the contention thus:

" The proposition of counsel seems to be, that the capital
" of savings banks can be taxed by the State in no other
" way than by an assessment upon the shares of that capi-
" tal held by individuals, because, under the Act, the capi-
" tal of the national banks can only be taxed in that way.
" It is strongly urged that in no other mode than by taxing
" the stockholders of each and all the banks can a perfect
" equality of taxation be obtained."

And it is held that the State is not required to abandon its own system of taxing the capital of corporations instead of their stock in order to effect taxation or national bank stock.

This case was in line with *Mercantile Bank* vs. *New York*, 121 U. S., 138-60, wherein it was held that a tax levied upon the capital and franchise of State trust companies and savings banks will satisfy the requirements of the Act of Congress, notwithstanding the stock of such corporations is not directly taxed.

See, also:

Palmer vs. *McMahon*, 133 U. S., 660.
Bank of Redemption vs. *Boston*, 125 U. S., 60.

These cases are cited and approved by Mr. Justice White, in *Owensboro National Bank* vs. *Owensboro*. They are cited for the purpose of pointing the distinction between that class of cases in which it is held *that the power conferred by Congress does not admit of the taxation of corporate property of national banks directly,* and that class of cases which hold that *there is no discrimination against national bank stock when the corporate property of State banks is taxed instead of the shares of stock of such banks.*

When, therefore, it is established, as it is in this State, that all the corporate property of State corporations is taxed, and that, under this tax system, the taxation of such property is the equivalent of the taxation of all the property of such corporations, it necessarily follows that there is no discrimination against national bank shares under a law which places the tax upon such shares.

Equivalency in Fact.

That there is an equivalency in fact, as well as in law, is demonstrated by the following statement. Through this statement a comparison is presented by the hypothetic assessment of the assets of the Nevada National Bank as a State bank. The figures are taken from the agreed facts.

ASSETS.

1.	Call Loans	$4,678,532 76	
2.	Bills Discounted	120,131 78	
3.	Bills Receivable	133,700 00	
			$4,932,464 54
4.	Treasurer U. S. 5% Redemption Fund		29,700 00
5.	Due from Banks and Bankers		562,173 96
	Collections	185,880 26	
	Sterling Acceptance Debtors	196,126 61	
	Debtors to Foreign Credits	488,196 23	
			870,203 10
7.	United States Bonds	2,335,284 05	
7½.	Miscellaneous Bonds	963,099 88	
			3,298,383 93
8.	Safe and Fixtures	3,450 00	
	Taxes	582 96	
	Expenses	16,240 85	
			20,273 81
9.	Cash on hand		2,276,917 81
			$11,990,117 15

LIABILITIES.

10.	Capital	$3,000,000 00		
11.	Reserve	600,000 00		
12.	Profit & Loss	324,298 74		
			3,924,298	74
	Circulating Notes		249,590	00
13.	Current Accounts	3,518,056 35		
14.	Certificates of Deposit	563,807 68		
15.	Certified Checks	398,417 77		
16.	Cashier's checks outstanding	15,000 00		
17.	Due to Banks and Bankers	2,342,211 67		
			6,837,493	47
	Bills received for collection	185,880 26		
	Sterling Acceptance Creditors	196,126 61		
	Commercial Credits	331,231 23		
	Travelers' Credits	156,965 00		
			870,203	10
	Interest	61,048 26		
	Commission	7,551 46		
	Inland Exchange	4,520 24		
	Foreign Exchange	17,763 71		
			90,883	67
	Dividend Account		2,782	50
	Assets Suspense Account.		14,865	67
			$11,990,117	15

State of California,
City and County of San Francisco—ss.

I, George Grant, cashier of the Nevada National Bank of San Francisco, do solemnly swear that the above statement is true to the best of my knowledge and belief.

(Notary's acknowledgment.)

(Signed) GEORGE GRANT, Cashier.

18. Varions Bonds.....$623,516 55
19. California quasi public Corporations 339,583 33

———— $963,099 88

(Signed) GEORGE GRANT, Cashier.

SUMMARY NEVADA NATIONAL BANK.

As a State bank—From items Nos. 1, 2, 3, 4, 5, 18, aggregating $6,147,852, may be deducted items Nos. 13, 14, 15, 16 and 17 (if due bona fide residents of Cal.), aggregating $6,837,491, leaving no balance as assessable for solvent credits. Item No. 8 would be assessed as furniture, ($3,450) or more; item No. 9 as money $2,276,917); total assessment for tangible property $2,300,367, to which add a franchise value of $574,766, making a total assessed value of $2,875,133—$95.83 a share. Franchise value is arrived at by multiplying 30,000 shares by $185—market quotation—making $5,550,000, less value of exempt property—items 7 and 7½ and 18, aggregating $2,674,867—leaving a

net assessable market value of $2,875,133—from which assessed value of the tangible property ($2,300,367) is deducted, leaving assessment of franchise $574,766.

As a National bank—Market value of stock $185 a share, by 30,000 shares—$5,550,000, less non-taxable property—item 7, 7½ and 19—aggregating $2,674,867, leaving $2,875,133 as total assessable value of all the shares (30,000 shares), or $95.83 assessable value of each share.

State Bank assessment.....$2,875,133
National Bank assessment..... 2,875,133
National Bank actually assessed at..... 2,445,000
i. e., $81.50 per share.

II.

Deductions of "Property Exempt by Law."

It was considered possible to assess the stock of national banks without an enabling Act, on the theory that the property of such institutions, other than real estate, was not taxable. The attempt was made in *McHenry* vs. *Downer*, 116 Cal., 20, and the Supreme Court of the State held that, in the absence of legislation designed to accomplish the assessment of national bank stock, no such assessment could be made. It held further that there was a discrimination against national bank stock, in an assessment of that stock when the corporate property of State corporations was assessed, and not the stock. In short, under the laws of the State, as they then existed, there was not an equivalency between the assessment of the stock of

national banks and the assessment of the corporate property of State corporations. It was not questioned by the Court, however, but that such equivalency could be made to exist. It was held that a discrimination was possible against national banks, because in the estimation of the value of its shares no deduction was allowed on account of U. S. bonds and other non-taxable securities, which were not assessed when owned by State corporations.

The point may be illustrated thus: The Bank of California owns $1,000,000 worth of U. S. bonds and bonds of *quasi* public corporations, which are not taxable. Its entire corporate property, including such bonds and excluding its franchise, is valued at $5,000,000. The market value of its stock aggregates $6,000,000. Its franchise is valued, therefore at $1,000,000. It will be assessed therefore for $1,000,000 on its franchise and $5,000,000 tangible property, less the non-assessable bonds, worth $1,000,000. Its entire assessment, therefore, will be $5,000,000.

Now, in the case of a national bank owning similar property, under the law as it existed when *McHenry* vs. *Downer*, *supra*, was decided, no deduction from the value of its property, which would be used in estimating the value of its shares, would be allowed on account of U. S. bonds. As had been decided in *Van Allen* v. *Assessors*, 3 Wall., 573, and kindred cases, such bonds should be included in the valuation of such stock. This was the result: The stockholders of a national bank holding $1,000,000 in U. S. bonds, the stock of which had an aggregate market

value of $6,000,000, would be assessed for $6,000,000, less the value of the bank's real estate only. Here, then, there would be a discrimination against such stockholders in the assessment of the U. S. bonds held by the bank and the exemption of such bonds, when held by a State bank.

In the adoption of the Act of March 14, 1899, however, the Legislature has made provisions whereby this discrimination is removed, by allowing the same exemptions to the national banks as have been enjoyed by State banks. It is therein provided:

"In making such assessment to each stockholder, there "shall be deducted from the value of his shares of stock "such sum as in the same proportion to such value as the "total value of its real estate and property exempt by law "from taxation bears to the whole value of all the shares "of capital stock in said national bank."

The Assessor is authorized and required, therefore, to deduct from the value of the share of stock, such sum as is in the same proportion to such value as the total value of its real estate and property exempt by law from taxation bears to the whole value of all the shares. This the Assessor has done in this case. The method pursued will be found set forth in appellant's bill. It appears therefrom that the Assessor permitted a deduction on account of U. S. bonds, deposited to secure circulation, on account of U. S. bonds on hand, and on account of stocks and bonds of California corporations exempt under *Germania Trust*

Co. vs. *S. F.*, 128 Cal., 589. The total deduction made was divided by 30,000, the number of shares issued by appellant. This sum was deducted from the market value of appellant's stock, and the balance was assessed as the value of each share.

Those properties, therefore, which are treated as exempt in the assessment of the properties of State banks, are also treated as exempt in an estimation of the value of the shares of national banks. Absolute equality is maintained thereby, and any possible discrimination on account of such exemptions is avoided.

Solicitor for appellant seeks to give this provision in the Act of 1899 such an interpretation as would entirely nullify and defeat its purpose. The deduction allowed on account of "property exempt by law," he would have the Court so interpret as to require a deduction of all the properties of the national bank, thereby leaving no value in the share to be assessed. Such a construction would lead to a manifest absurdity. Such a construction would create a contradiction in terms, requiring the assessment of the stock, and providing a means for ascertaining its value, which would relieve it entirely from such assessment. No such intent can be attributed to any Legislature in the presence of any possible construction which will give effect to the language used. Where a statute is fairly susceptible of two constructions—one leading inevitably to mischief or absurdity, and the other consistent with justice, sound

sense and wise policy—the former should be rejected and the latter adopted.

In re Mitchell, 120 Cal., 384-86.
Jacobs vs. *Supervisors*, 100 Cal., 127.
Sedgwick on Stat. and Const. Law, 312.

When, therefore, it becomes manifest, from a review of the revenue laws of California, as construed by her Courts, that the deductions to be allowed, under this section of the Act, were to be so allowed for the purpose of avoiding a possible discrimination against national banks, it is fair to consider the exemptions permitted State banks in order to determine what exemptions are intended to be allowed national bank stockholders. When the purpose and intent of the Act is kept in mind, no difficulty is experienced in giving to this provision a rational and correct interpretation.

Nor is appellant's solicitor correct in the assumption that all the property of national banks is exempt from taxation, except their real estate. It is undoubtedly true that direct taxation of the property of a national bank, other than its real estate, is not permissible. But it does not follow that such property cannot be taxed for that reason. On the contrary, Congress has seen fit to permit the taxation of such property through the medium of the shares. In the valuation of the shares each and every element of property possessed by the national bank is to be considered, including United States bonds. The property of such banks is not exempt by law, therefore, from taxation. The Act of

1899 has manifest reference to such property as is exempt when held by State banks, and such property may include United States bonds and stocks and bonds of California corporations. By the deduction of such property from the property assessed to State banks, and from the value of the shares of national banks, absolute equality is created in the taxation of both.

It is thus evident both by the statutes and decisions of this State, that the system of taxation on its face works no discrimination against the national bank shareholders, and that it was the thought and intent of the State Legislature that the taxation of the property and the taxation of the shares was one and the same.

The purpose of this method of taxation was to avoid what the Supreme Court of the State had declared to be double taxation. And in the case of *Hepburn* vs. *School Directors*, 23 Wall., 480, it is held that the exemption of all morgages, judgments, recognizances, and monies owing upon articles of agreement for sale of real estate from taxation to prevent a double burden, by the taxation both of the property and the secured debt, was a justifiable exemption and did not discriminate against shareholders of national bank stock.

III.

Due Process of Law.

Counsel for appellant advances the contention that the Act of March 14, 1899, has the effect of depriving the stock-

holders of the Nevada National Bank of their property without due process of law. Fortunately this subject, in its relation to the assessment and taxation of property, has been so often and so thoroughly considered by the Supreme Court of the United States, and the Courts of the different States, as to leave but little room for controversy.

The necessity for notice, either actual or constructive, with an opportunity to be heard, may be considered essential to the validity of a tax, where the tax is to be levied upon an assessment, based upon a valuation of the taxpayer's property, fixed by the Assessor. But it is equally true that the opportunity to be heard, and such notice, may be given after, as well as before, the assessment. And where, as in this State, provision is made for a board of revision or equalization, the time for the sitting of which is fixed by law, it is held that a sufficient opportunity for a hearing is afforded to answer the requirements of due process of law (Sec. 3672, *et seq.*, Pol. Code).

"The officers in estimating the value act judicially; and "in most States provision is made for correction of errors "committed by them, through boards of revision or equal- "ization, sitting at designated periods provided by law to "hear complaints regarding the justice of the assessments. "*The law, in prescribing the time when such complaints* "*will be heard, gives all the notice required, and the pro-* "*ceeding by which the valuation is determined,* though it

" may be followed, if the tax be not paid, by a sale of the " delinquent's property, *is due process of law.*"

Hagar vs. *Reclamation District,* 111 U. S., 701-10.

"It is enough, however, if the law provides for a board of " revision authorized to hear complaints respecting the jus- " tice of the assessment, and prescribes the time during " which, and the place where, such complaints may be made " (*Hagar* vs. *District,* 111 U. S., 701-710)."

Palmer vs. *McMahon,* 133 U. S., 660-69.

And as Justice Miller said, in *State Railroad Tax Cases,* 92 U. S., 575-610:

"This board has its time of sitting fixed by law. Its ses- " sions are not secret. No obstruction exists to the appear- " ance of any one before it to assert a right or redress a " wrong; and in the business of assessing taxes, this is all " that can be reasonably asked."

Kentucky R. R. Tax Cases, 115 U. S., 330-2-3.

And as the Supreme Court of Missouri says, in *State ex rel.* vs. *Springer,* 134 Mo., 225-6:

"Nor is it essential to 'due process' that an opportunity " for a hearing should precede the order of assessment or " increase of assessment (*Black* vs. *McGonigle* (1891), 103 " Mo., 192). A hearing allowed after, as well as before the

"formal order, will meet the demands of constitutional "right, if the Legislature ordains that procedure * * * "a statutory appointment of a date to make objections to "antecedent steps (in the matter of assessments for taxa- "tion) affords a sufficient opportunity for a hearing there- "on to answer the requirements of due process of law."

Land Co. vs. *Minnesota,* 159 U. S., 626-37.
Lent vs. *Tillson,* 140 U. S., 324.

It is the provision of the California Constitution, Section 9, Article XIII, that:

"The Boards of Supervisors of the several counties of the "State shall constitute boards of equalization for their re- "spective counties, whose duty it shall be to equalize the "valuation of the taxable property in the county for pur- "poses of taxation; provided, such State and county "boards of equalization are hereby authorized and empow- "ered, under such rules of notice as the county boards may "prescribe as to county assessments, and under such rules "of notice as the State board may prescribe as to action of "the State board, to increase or lower the entire assess- "ment roll, or any assessment contained therein, so as to "equalize the assessment of the property contained in said "assessment roll, and make the assessment conform to the "true value in money of the property contained in said "roll."

And Section 3672 of the Political Code fixes the time at

which such county boards of equalization shall meet as follows:

"The Board of Supervisors of each county must meet on " the first Monday of July in each year to examine the as- " sessment book and equalize the assessment of property in " the county. It must continue in session for that purpose, " from time to time, until the business of equalization is " disposed of, but not later than the third Monday in July."

These provisions of the law afford the taxpayer a full opportunity to appear and present his views regarding the assessment, and, under the authorities, satisfy the requirements of due process of law.

Cooley on Taxation, pp. 364-5.
State vs. *Runyan,* 41 N. J. L., 98.
Hagar vs. *Reclamation District,* 111 U. S., 701-10.
Palmer vs. *McMahon,* 133 U. S., 660-669.
State Railroad Tax Cases, 92 U. S., 575-610.
Kentucky Railroad Tax Cases, 115 U. S., 330-2-3.
Lent vs. *Tillson,* 140 U. S., 324.
State vs. *Springer,* 134 Mo., 225-6.
Land Co. vs. *Minnesota,* 159 U. S., 626-637.

In addition to this, provision is found in Constitution and statute for the presentation, by the taxpayer, to the Assessor, of a statement of his taxable property. Section 8, Article XIII, of the California Constitution, provides;

"The Legislature shall by law require each taxpayer in

" this State to make and deliver to the County Assessor an-
" nually a statement, under oath, setting forth specifically
" all the real and personal property owned by such tax-
" payer, or in his possession, or under his control, at twelve
" o'clock meridian of the first Monday of March."

And the Legislature has complied with this mandate in the enactment of Section 3629 of the Political Code.

So, under the California system, as interpreted by the Supreme Court of that State in *Henne* vs. *Los Angeles County,* 129 Cal., 297-9:

"For an overvaluation of the assessment of property be-
" longing to a taxpayer a remedy is furnished him by stat-
" ute, as already shown, first by application to the Assessor
" at any time before it passes out of his hand to the Board
" of Supervisors, and thereafter to the Board of Super-
" visors, until the assessments have been equalized and the
" matter has gone beyond their control."

And this right to a hearing before the Assessor in the first instance, and before the local Board of Equalization, later, is as fully secured to a taxpayer who pays unsecured personal property taxes as to one whose taxes upon personal property are secured by real property.

As the Supreme Court of California has held, in *Rode* vs. *Siebe,* 119 Cal., 521:

"As to the right of equalization, that is not taken away
" by a previous collection of the tax; and if the assessment

" is reduced by either board of equalization the excess over " the true amount of the tax is refunded."

We believe it will be plain upon a reading of the two or three authorities cited by counsel for complainant, in the light of the statutes under which those cases were decided, that they are not in point upon the question now under review, and that they do not conflict with that great number of cases, some of which are cited above, in which the rule is stated that an opportunity to appear, either before the Assessor or a board of equalization, satisfies the requirements of due process of law.

Of course, the Act of March 14, 1899, could not have denied such opportunity, since it is guaranteed to all taxpayers by Section 9, Article XIII, of the State Constitution.

" The Legislature has no power thus to deprive a citizen " of an opportunity of appearing before the board (of equal- " ization) for the purpose of contesting the amount as- " sessed against him."

People vs. *Railroad Co.*, 67 Cal., 625.

If given the construction contended for by complainant, it would be brought in contact with this provision of the Constitution and would thereby be destroyed. But its evident import is to avoid the necessity for further *personal* notice, and in this construction it is a constitutional exercise of power. As Judge Cooley says, in his work on Taxation, pages 364-5:

"It is not customary to provide that the taxpayer shall "be heard before the assessment is made, except where a "list is called for from him; but a hearing is given after- "wards either before the Assessors themselves, or before "some Court or board of review. And of the meeting of "that board or Court the taxpayer must in some manner "be informed, either by personal notice, or by some general "notice which is reasonably certain to reach him, or— "which is equivalent—by some general law which fixes the "time and place of meeting, and of which he must take no- "tice. The last is a common method of bringing the as- "sessment to the notice of the taxpayer, and it is, perhaps, "the best of all, because it comes to be generally under- "stood and is remembered."

Personal notice in the case at bar may be considered impossible, in view of the non-residence of the stockholders of complainant. It would be so generally in any case, considering the brief time in which the assessment must be made and the vast number of individual taxpayers. So it has been held:

"Constructive notice, such as is above provided for, is, "in fact, at the present time, the only notice a non-resident "receives of the assessment of taxes on lands, or on chat- "tels, which are taxable in the township in which they are "located. * * * If the prosecution's view of the neces- "sity of notice other than constructive notice, such as is "above referred to, be correct, no legal assessment of taxes

"can be made in this State against the owner of real or "personal property who happens to be a non-resident of "the township in which the same is located. The counsel's "contention on this ground is without foundation."

Lent vs. *Tillson*, 140 U. S., 324.

The language of the California statute, in this particular, is taken *verbatim* from Section 312 of an Act of the Legislature of the State of New York, passed July 1, 1882, the validity of which is affirmed in *Mercantile Bank* vs. *New York*, 121 U. S., 138. The section is set forth on pages 139-140 of that report.

In conclusion, it may be said that the determination in favor of the validity of the tax was reached by the Court below only after several days of oral argument, and a final submission upon printed briefs, of which the briefs filed here are copies. The matter there received the serious consideration to which it is entitled, and the learned Judge of the Circuit Court reached the conclusion indicated only after the most mature deliberation. We respectfully submit, the decision rendered was correct and the judgment should be affirmed.

FRANKLIN K. LANE,
City Attorney,
Solicitor for Appellees.

W. I. BROBECK,
Assistant City Attorney,
Also for Appellees.